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FOREWORD

The content of this, the fourth issue of this journal fully bears out the value of a cross-jurisdictional approach. The topics covered by our articles, jurisdiction spotlight and case notes will be familiar to practitioners across the Commonwealth - delay, trial by jury, what use, if any, to make of unlawfully obtained evidence or of lawfully, but surreptitiously obtained evidence, accessorial liability, attempts, causation and the dangers inherent in vaguely defined offences, such as war crimes or misconduct in a public office. If there is a theme to this issue, it is that of the courts putting the interests of the state before the interests of justice. Ho Hock Lai (at p.232, post) presents a forceful case that the judiciary in Singapore have been wrong to reject the common law discretion to exclude illegally obtained evidence, on the basis that it is inconsistent with the code of evidence in that jurisdiction. He suggests that this unjustifiably prioritises the desire of the state to maintain law and order above the protection of The third and fourth articles by three an individual's rights. academics from the University of New South Wales also touch on Jessie Blackbourn and Nicola McGarrity present a compelling critique (at p.257, post) of the inadmissibility of intercept evidence in the United Kingdom, and compare it to the reverse stance taken by the Australian courts. They argue that the U.K.'s approach has led to the excessive use of executive measures, such as control orders, because prosecutions have become largely untenable, and that this position should not be preferred to the use of safeguarded criminal proceedings. Fergal Davis (at p.283, post) discusses the fate of jury trials in terrorist and gang-related cases in the common law jurisdictions of Ireland and New Zealand, where there are limitations on their use. His article provides an excellent illustration of how legislation designed for one purpose can be misused by state agents for an entirely different purpose.

Our opening article, by the distinguished English academic, Professor G.R. ("Bob") Sullivan, continues a theme that has featured in previous issues: accessorial criminal liability and causation (see the case notes on *Gnango* (England and Wales) [2011] J.C.C.L. 299, *Kho Jabing* (Singapore) [2012] J.C.C.L. 174, *Mzwempi* (South Africa) [2012] J.C.C.L. 180, and *Edmonds* (New Zealand) [2012] J.C.C.L. 189). This complex issue is discussed through a powerful and compelling argument which calls for the abolition of complicity and the joint enterprise doctrine and an extension of the class of principals to include persons other than the person who actually perpetrates the prohibited wrong. These issues are further considered in the case note on *Burns* (at p.353, *post*), in which the High Court of Australia

had to rule on the thorny problem of the liability of a person who supplies unlawful drugs to another who then dies from an overdose of those drugs which he has voluntarily consumed. Among the authorities cited to the court were the leading, but conflicting, English and Scottish decisions.

Our jurisdiction spotlight focuses on the Caribbean (at p.308, post). This fascinating piece, written by the former Attorney-General of Trinidad and Tobago, John S. Jeremie S.C., brings into particularly sharp relief the tension between crime control initiatives and respect for the fundamental requirements of due process. In addition, the author reflects on the conundrum as to why it is that so many Commonwealth Caribbean states persist with the Privy Council as their final court of appeal. Decisions such as that in Campbell v. The Queen ([2010] UKPC 26 (and see [2011] J.C.C.L. 151)) and Hamilton (noted at p.335, post) make it all the more remarkable that these states have not long since bought into the case for the Caribbean Court of Justice.

Our other case notes cover a broad, but current and important, set of topics. The Hong Kong case note (at p.342, post) on the offence of misconduct in public office should undoubtedly resonate with lawyers in England and Wales, where this offence has been dusted down in recent years and used to prosecute all manner of conduct of which somebody disapproves, and often committed by persons who, in no meaningful sense, hold "public office". Case notes from New Zealand (at p.357, post) and Canada (at p.366, post) address the vexed issues of where to draw the line between a merely preparatory act and an attempt, and the criminal liability of a person who exposes another person to a potentially life-threatening disease through consensual sexual activity.

Special mention should be made of Zentai, a decision of the High Court of Australia, and the subject of our sixth case note. The case deserves its place in legal history not for the decision of the majority, but for the remarkable dissent of the Honourable John Dyson Heydon A.C. Lord Denning was famed for his intellect, his independence and his unmistakeable style. As exemplified by the first paragraph of his judgment (quoted in full by Patricia Aloi in her case note, which is at p.327), Justice Dyson Heydon is right up there Any anthology of truly powerful judgments in the common law world would surely include at least one of Justice Heydon's, with that in Zentai being an obvious candidate. fearless independence, intellectual brilliance and the breadth and depth of his learning are evident both from his judgments and his many extra-curial writings. In his February, 2003, farewell speech to the Supreme Court of New South Wales upon his elevation to the High Court of Australia, he referred to the various "fresh starts" his

life had involved. These, he said, were nothing compared to what lay ahead: "Now I have to deal with a unique institution, peopled with formidable and inscrutable characters. I have to walk up to the sphinx, enter the most arcane of coteries, and try to survive. Just ahead lie the greatest and most mysterious riddles this side of eternity." As his retirement approaches in March, 2013, it is possible to say that not only has he survived, but, in the course of solving a fair few of those riddles, he has made an invaluable contribution to the jurisprudence of the common law world. Anybody in doubt about the value of cross-jurisdictional studies and well-stocked law libraries should read his speech in full (www.australianpolitics.com/news/2003/02/03-02-07.shtml).

As ever, I am grateful to the Editorial Board for their hard work and advice. Their support and encouragement have been invaluable, especially at a less than propitious time for launching a new journal in the field of criminal law and practice. Special thanks are also due to Atli Stannard and Lydia Waine. Both have contributed case notes, and, with the former taking the lead, they have undertaken the whole process of putting this issue together, from commissioning articles, through arranging for peer-review, to sub-editing the entire content.

J.R. November 25, 2012

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DOING WITHOUT COMPLICITY

G.R. Sullivan*

ABSTRACT

It will be argued that liability for criminal offences based on complicity and the joint enterprise doctrine should be abolished. The case against complicity and joint enterprise is that they give rise to complexity, uncertainty, excessive litigation and, on occasion, injustice. A proposal will be made to confine criminal liability to principal offenders. This will require enlarging the class of principal offenders and also the availability of inchoate offences of encouraging and assisting crimes. The claim will be made that, subject to those conditions, the abolition of secondary offenders will reduce complexity and enhance justice without undermining the effective enforcement of the criminal law.

I. INTRODUCTION

P is a contract killer currently without a usable weapon. contacted by D(1), who gives him a new revolver and promises him £20,000 for the killing of V(1). As agreed, P kills V(1) and then goes on to use the revolver to kill V(2) after agreeing with D(2) to do so. Dealing only with the potential liability of D(1) under the law of England and Wales, in relation to the killing of V(1) he is very likely guilty of conspiring or soliciting to commit murder,1 statutory conspiracy to commit a criminal offence,2 the statutory offences of intentionally encouraging or assisting crime,3 and the crime of murder itself as P's accomplice.4 As for the murder of V(2) he might well be guilty of assisting an offence believing that it will be committed⁵ if he was sure that P as a contract killer would go on to use the weapon for further killings. He might also be P's accomplice to that murder if that ersatz form of complicity, sometimes called "parasitic accessory liability"6 (contrasted with direct or true complicity), based on a joint enterprise, applies to these facts. As is well known, this form of

^{*} Emeritus Professor of Law, University College London. Thanks are due to Atli Stannard and Lydia Waine for their invaluable help in the preparation of this article.

Offences Against the Person Act 1861, s.4.

² Criminal Law Act 1977, s.1.

³ Serious Crime Act 2007, s.44.

⁴ Accessories and Abettors Act 1861, s.1. The section imposes liability as an accomplice on whosoever aids, abets, counsels or procures the commission of an offence. The different modes of complicity are not defined and the detail is to be found in the case law.

⁵ Serious Crime Act 2007, s.45

⁶ The phrase is Sir John Smith's and was adopted by the Supreme Court in R. v. Gnango [2011] UKSC 59, [2012] 1 A.C. 827, [15].

secondary offending imposes liability for "collateral" offences, provided the collateral offence is sufficiently associated with an initial joint enterprise to commit a separate offence. On that last matter, there might be some doubt whether P's killing of V(2) had a sufficient connection with the joint enterprise that D(1) and P formed to kill V(1). Resolution of that doubt might well require yet another appellate decision on the nature and limits of the joint enterprise doctrine.⁷

Of course, if the facts seem clear and stable, a prosecutor may well rest content with seeking just one murder verdict against D(1). But in the murky world of contract killings there may well be gaps in the evidence concerning who agreed what with whom, and any clarity of the initial case may be undermined by a sudden change in testimony. So it is not at all unreasonable for a prosecutor to keep all options open. It is the burden of this article to persuade readers that English and Anglophone Commonwealth prosecutors should have fewer options in cases like that of D(1). It will be argued that liability for murder (and other serious offences) should be confined to principal offenders. Complicity, including the form of complicity based on joint enterprise, should be abolished. Forms of association with the commission of offences by others which fall short of establishing that the defendant was a joint principal in the offence should be covered by the inchoate offences of conspiracy and assisting or encouraging crimes.

The thought that Anglophone criminal law would be better off without complicity is far from novel. That was once the opinion of the English Law Commission when it proposed new inchoate offences of assisting and encouraging crimes as a replacement for complicity.⁸ Many years after this proposal, inchoate offences of assisting and encouraging crimes did reach the statute book,⁹ but as a supplement to, rather than a substitute for, complicity. Moreover, by the time of

Further use of the revolver to kill V(2) may be considered too remote from the agreement to kill V(1), and therefore not be an offence collateral to the joint enterprise D(1) made with P, even if D(1) foresaw the risk that P would, as a contract killer, use the revolver to kill in the future. However, in R. v. Reardon [1998] EWCA Crim 613, [1999] Criminal Law Review 392, there is authority that if D gives P a knife with intent to assist him to kill V(1), he will also be implicated in the killing of V(2) if he foresaw the risk of that happening. On the facts of Reardon, no issue arose about the scope of the joint enterprise because there was no joint enterprise, merely intentional assistance in the killing of V(1). So it may be, reverting to our example, that D(1)'s direct assistance to P in his killing of V(1) will be the gateway for implication in the killing of V(2) on the basis of foresight that something like that might happen. This extension of the scope of direct complicity has arguably been latent since Bainbridge [1960] 1 Q.B. 129. Matters are confused by the fact that, in Reardon, although there was no joint enterprise, joint enterprise cases were decisively applied.

⁸ Law Commission for England and Wales, *Assisting and Encouraging Crime* (Law Com. C.P. no. 131, TSO 1993).

⁹ Serious Crime Act 2007, ss.44-66.

the enactment of these new offences, the English law of complicity had become more extensive in its coverage and, in particular, secondary liability based on joint enterprise had become more Nonetheless, the view that complicity is surplus to requirements persists. Michael Moore has argued compellingly that complicity is superfluous.¹⁰ Joshua Dressler would strictly confine liability based on complicity to cases of substantial material assistance.¹¹ What follows is another contribution to the abolitionist cause, a cause which is not flourishing and is unlikely to flourish in England and Wales anytime soon.¹² The case to be made has doctrinal and normative parts. Essentially, the doctrinal case is that complicity law is too complex and unstable, too high maintenance judging by the amount of litigation that it generates.¹³ The normative case is that it is consistently unjust, imposing liability for the full offence on persons who do not share "parity of culpability" with the principal offender.¹⁴ There is a better way to map the doing and sharing of criminal wrongs which is more restrained but which would not impair the effectiveness of the criminal law.

It will be argued below that this better way requires a more accommodating conception of the circumstances in which a person can be considered a principal offender. Briefly for now, a case will be made for enlarging the class of principals to include persons additional to the perpetrator. There are persons who, though non-perpetrators, carry more responsibility for the commission of a criminal wrong than anyone else. Such a person would be D(1) in the example above, who conceived and greatly facilitated the plan

Michael S. Moore, Causation and Responsibility (OUP 2009), ch. 13.

Joshua Dressler, "Reforming Complicity Law: Trivial Assistance as a Lesser Offence" (2011) 5 Ohio State Journal of Criminal Law 427.

¹² Following the House of Commons Justice Committee's report on joint enterprise (*Joint Enterprise* (HC 2010-12, 1597)), the coalition government announced that it would make no changes to the law of joint enterprise or any other aspects of complicity law: http://www.justice.gov.uk/publications/policy/moj/government-response-to-justice-committee-report-on-joint-enterprise-law accessed November 20, 2012.

¹³ The joint enterprise doctrine has been particularly troublesome, with a plethora of appeals on such matters as what constitutes a joint enterprise, what is a material variation between the crime contemplated and the crime committed (a question requiring debate on such matters as whether some weapons or forms of attack are intrinsically different from other weapons or forms of attack), whether material variations matter when parties to the joint enterprise share an intent to kill, whether a party can be found liable for manslaughter where the circumstances of a murder are sufficiently different from anything he contemplated, how and when a party can withdraw from a joint enterprise, and so forth. See further David Ormerod, *Smith and Hogan's Criminal Law*, (13th edn, OUP 2011), 213-230.

¹⁴ "Parity of culpability" between principals and accomplices was the test the Law Commission for England and Wales used in their attempt to fashion a law of complicity that was not over-inclusive: *Participating in Crime* (Law Com. no. 305, TSO 2007), paras 1.5-1.9.

to kill V(1). In the case of such persons it is not enough to convict them of inchoate offences associated with the crime that they sponsored. They should bear, alongside the perpetrator, full responsibility for the offence itself. However, John Gardner has argued that, for offences which he terms "non-proxyable," this cannot be done. For him, the only persons eligible to be principals to these offences are perpetrators. These offences are important: if the class of principals for these offences must be confined to perpetrators, then complicity must stay.

II. IS THE DIVISION OF CRIMINAL WRONGDOERS INTO PRINCIPALS AND ACCOMPLICES A NECESSARY STRUCTURAL DIVISION?

The most straightforward way to bring D(1), the organiser of V(1)'s death, fully to book would be to treat him as a joint principal alongside P. It will be argued below that Anglophone criminal law should recognise three types of principal offender. The first type would be perpetrators. The second type would be persons who although not perpetrators have, by their conduct, had a causal influence on the commission of the offence. The third type would be persons who have jointly agreed with others to commit the offence, and intend that one or more parties to the agreement will commit the offence. To be convicted as a principal would require proof of any *mens rea* specified in the offence. A lesser form of culpability than that specified for the offence would not suffice, even for non-perpetrator principals.

Recognition of the second type of principal would require acceptance of the proposition that an agent's conduct can be considered caused at least in some significant sense by another person's intervention, even though the conduct of the agent remains fully voluntary. It will be argued that, for instance, the offer of money and the provision of a gun to P by D(1) was one of the causes of V(1)'s death. John Gardner, for one, would agree with that, in that he has expressed the view that the voluntary conduct of P can be caused by the intervention of D. But he would likely assert that the only murderer was P, and that D(1) can only be considered his accomplice.¹⁶

He argues that the only way of capturing the doing and sharing of wrongs for crimes where at least one party must be the physical perpetrator of the wrong and where the role of other culpable parties is necessarily less direct, is to allocate responsibility between accomplices and principals. In other words, the distinction between

¹⁵ John Gardner, "Complicity and Causality" [2007] Journal of Criminal Law and Philosophy 127.

¹⁶ ibid., 137-141

principals and accomplices is not merely a legal convention but a necessary structure to allocate liability for many crimes. Gardner, a fundamental reason for this state of affairs stems from what may be termed the intransitivity of many criminal and moral wrongs. Take what he calls the "non-proxyable" wrong of rape. If P penetrated a non-consenting V when possessed of the appropriate culpability, he is a rapist. In respect of that token of rape, no-one other than P can be so described. It may be that other persons stand in some form of blameworthy relationship to the rape of V. D, a woman, procures P to rape her enemy V.18 D's role in the rape of V may be more salient than P's. Left to his own devices, P would not have raped V, making D's procuring of P decisive in the matter of the rape. But it simply would not be true to say that D was a rapist. It was not D but P that penetrated V, an activity that cannot be done by proxy. For Gardner, it follows from this indubitable fact that the only way that D can be brought to book in law and in morals is to hold D to account as P's accomplice.19

It is no more than the literal truth that certain crimes as currently defined require the principal to be the physical perpetrator. If we define the conduct element of homicides as causing the death of V, then clearly there may be more than one causal agent in play, and conduct remote in time and place from the actual killing may count as a causal input. But should we define the conduct element in homicides as the killing of V, it follows that some physical involvement in the process that was the immediate cause of death is required. Does this mean then, for crimes defined in that manner, that the cast of principals is limited to participants of that stripe that, for instance, only the man who penetrated V can be a principal in the crime of rape? Not so. The conventions of the law can be adapted to enlarge the class of principals beyond the perpetrator even for crimes such as rape. How this can be done in technical terms will be addressed later. Such a technical adjustment is essential if complicity is to be abolished. There will be considerable gains in economy of means and simplicity, should this be done. More importantly, better accounts of the locus of responsibility can be made if the class of principals is enlarged in the fashion that will

A term, as Gardner acknowledges, first employed by Sanford H. Kadish: "Complicity, Cause, and Blame: a study in the interpretation of doctrine" (1985) California Law Review 323, footnote 162.

¹⁸ As in *DPP v. K and B* [1997] 1 Criminal Appeal Reports 36.

¹⁹ Institutionally, this is the case in current English law: as the offence is worded in s.1 of the Sexual Offences Act 2003, the principal offender can only be the person who penetrates V. For Gardner, this would not merely be a matter of conventional definition, but a necessary truth. It will be argued that persons additional to rapists may be principals to the offence of rape according to how the offence is defined.

be advocated. By contrast, Gardner would argue that the division between principals and accomplices is of a natural kind that cannot be abolished by fiat. A re-engagement with Gardner will be necessary when the legal specifics of enlarging the class of principals are presented. Until then, the working assumption is that this change can and should be made.

III. COMPLICITY: COMPLEX AND OVERLY PUNITIVE

The rules that comprise the law of complicity are complex. They consistently give rise to concern about the appropriateness of many verdicts of guilt *qua* accomplice for the full crime committed by P. D's part in P's primary wrong may be peripheral or immaterial. Even where D's contribution has significance for the commission of P's crime, D's culpability may be of a lesser order than P's.²⁰ Of course, the converse may apply, as in our contract killing scenario. That is one reason to enlarge the class of principal offenders beyond perpetrators. Frequently however, the class of accomplices includes persons whose conduct and culpability fall far short of the principal's.

The doctrinal starting point for analysing complicity is that the liability of an accomplice is derived from the wrong of the principal.²¹ The presence of the primary wrong can weigh the scales against D from the outset. Because D is fully liable for the same crime as P, his conduct should make a significant contribution to the perpetration of the wrong by P. Further, there should be some form of culpability possessed by D which is broadly of the same magnitude as the culpability possessed by P.²² But the presence of P's wrong may cast a shadow on any person culpably associated with it, encouraging expansion of the class of accomplices. Here, the focus will be on the

Dissatisfaction with the form and content of the English law of complicity has lead to proposals for reform from the Law Commission for England and Wales: *Participating in Crime* (n.14). Separate proposals were made in relation to participation in homicide: *Murder, Manslaughter and Infanticide* (Law Com. no. 304, TSO 2006), part 5. For some tastes, the proposals cleave too closely to the current law: G.R. Sullivan, "Complicity in First Degree Murder and Complicity in an Unlawful Killing" [2006] Criminal Law Review 502; "Participating in Crime: Law Com no. 305 – Joint Criminal Ventures" [2008] Criminal Law Review 19. Principles similar to English law apply to most jurisdictions in the USA and have given rise to similar concerns: see Dressler, "Reforming Complicity Law" (n.11), and his "Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem" (1985) 37 Hastings Law Journal 91.

²¹ For a comprehensive account of the implications of the derivative nature of criminal liability on the basis of complicity see Kadish (n.17).

²² As liability on the basis of complicity is based on common law principles in England and Wales, the common law presumption in favour of *mens rea* has been interpreted as requiring some form of culpability on the part of the accomplice even for statutory offences of strict liability: *Hobbs v. Winchester Corporation* [1910] 2 K.B. 471.

doctrines, or rather the lack of constraining doctrine that accommodates this expansion of liability. Further on, the focus will change to the facts of particular cases, underscoring the injustice that frequently arises when accomplices are held to account on the same penal basis as principals.

A. The conduct element in complicity

Using for illustration the crime of murder as understood in English law, the elements of liability concerning the principal are easily stated: P must cause the death of V while acting with an intent to cause V's death or to cause V serious bodily harm.²³ The moment we turn to D, the putative accomplice, things become considerably more It is well to remember at this point that, as complicated. Lord Bingham observed, there are more accomplices to murder than murderers.²⁴ In that sense, the elements of liability for murder qua accomplice are more prominent in resolutions of liability for the offence than the elements of the principal offence itself. On the plane of actus reus, what D did should somehow connect him with P's killing of V. But what kind of connectivity should it be? A causal connection, if not necessary (though some judges and theorists continue to insist it is necessary),²⁵ should always be sufficient. However, doctrinal restraints on what may constitute a causal input into a wrong perpetrated by another complicate the picture. Even if we can claim that D's conduct was a sine qua non of V's death, as in the contract killing discussed above, if a particular jurisdiction applies the doctrine that the freely chosen conduct of one agent cannot be considered caused by any non-coercive or non-deceptive intervention by another agent, then many decisive interventions are rendered causeless in the eye of the law. In the absence of inchoate offences of assistance and encouragement, the institutional imperative to penalise non-coercive or non-deceptive encouragement and assistance within the law of complicity ensured that interventions which were

²³ There is no statutory definition of murder in England and Wales, but the form and nature of the culpability required for the offence seems, at last, to be settled: A.P. Simester *et al.*, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Hart 2010), ch. 10.

²⁴ R. v. Rahman [2008] UKHL 45, [2009] 1 A.C. 129, [7].

²⁵ For example, K.J.M. Smith, A Modern Treatise on Complicity (OUP, 1991), ch. 3; Hughes L.J. in R. v. Mendez [2010] EWCA Crim 516, [2011] Q.B. 876. However, there are many decisions where any causal impact of D's conduct on P's criminal act is impossible to discern. For a recent example, see R. v. Stringer [2011] EWCA Crim 1396, [2012] Q.B. 160.

non-causal in doctrinal terms were nonetheless within its boundaries.²⁶ Thus the way was opened for rulings that any acts of assistance or encouragement, whether salient or, as may be in some cases of encouragement, irrelevant to the history of P's primary wrong, were enough.²⁷

The nature of the connectivity between D's conduct and the perpetration of P's wrong has been further weakened by the importation into the law of complicity of the doctrine of joint enterprise. In the briefest of terms,²⁸ this doctrine most obviously comes into play where D and P explicitly agree to commit a crime, say the crime of burglary. However, a joint enterprise in legal terms may be a joint enterprise in name only. There is authority that liability said to be based on a joint enterprise may in fact be based on mere complicity falling short of joint enterprise.²⁹ Once under the roof of joint enterprise, D may find himself a secondary party to crimes additional to any burglary that P commits.

For instance, if during the course of the burglary, P commits a further crime – he attacks the householder when she disturbs the burglary – and D has foreseen that this or something similar might happen, D too will be liable for the assault upon V. This controversial form of liability is now entrenched in English law by three appellate decisions of the highest authority.³⁰ What those decisions fail to deliver is any doctrinally sustainable account of this form of liability. Where D and P agree to burgle V and carry out the burglary together, the presence of the joint enterprise adds nothing to the obvious finding that they are joint principals in burglary.

²⁶ See Lord Bingham in R. v. Kennedy (No. 2) [2007] UKHL 38, [2008] 1 A.C. 269, [17], quoting with approval from Glanville Williams, "Finis for Novus Actus" (1989) 48 Cambridge Law Journal 391, 398:

[&]quot;Principals, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be the principal and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed."

²⁷ For examples of non salient tokens of assistance or encouragement criminalised in terms of full liability for the consummated offence, see *Wileox v. Jeffery* [1951] 1 All E.R. 464 (Divisional Court), and R. v. Bryce [2004] EWCA Crim 1231, [2004] 2 Cr.App.R. 35. In *Giannetto* [1997] 1 Cr.App.R. 1, the Court of Appeal considered that D would be an accomplice to P's murder of V if he had said "Oh goody" when P told him of his intention to kill V.

²⁸ For a full account and defence of this doctrine, see A.P. Simester, "The Mental Element in Complicity" [2006] Law Quarterly Review 578.

²⁹ R. v. Reardon [1999] Criminal Law Review 392, (Court of Appeal); R. v. Greatrex and Bates [1999] 1 Cr.App.R. 126 (Court of Appeal); R. v. Gilmour [2000] N.I. 367, [2000] 2 Cr.App.R. 407.

⁵⁰ R. v. Powell, R. v. English [1999] A.C. 1 (House of Lords); R. v. Rahman (n.24); R. v. Gnango (n.6).

The same applies where D and P agree the burglary, and D provides assistance – say as a look-out – and P enters the dwelling. Proof of the joint enterprise is irrelevant to findings that they are, respectively, an accomplice and a principal in burglary. Joint enterprise doctrine was formulated for circumstances where P commits a crime additional to burglary, as when P attacks V. It is clearly established that D will be liable for any offence that P commits if he has foreseen a risk that P might commit the offence with the *mens rea* for the offence in circumstances sufficiently linked to the burglary. So D will be guilty of murder along with P if P kills V and D foresaw a risk that P might intend to kill or intentionally cause serious harm to V should they be disturbed.

Finding D as well as P guilty of murder in such circumstances may well comport with many persons' intuitive sense of justice. The difficulty lies in doctrinally grounding the murder verdict against D. There is now a firm consensus that, given the joint enterprise to commit burglary (or whatever offence has been agreed), D will be liable for the collateral or further offence solely on the basis that he foresaw the offence might happen in circumstances arising out of the commission of the initial offence that D agreed with, or encouraged, or assisted P to commit.31 It will not avail D at all to claim, however truthfully, that he agreed to or assisted the burglary on the basis that no violence should be used, provided he knew there remained a risk of violence. There is recent support for the view that D's liability for the further offence is as a joint principal with P, but there are serious difficulties with accommodating that conception of D's involvement in P's crime within the current law.³² The majority opinion is that D is P's accomplice, a "parasitic accessory" in Sir John Smith's phrase. But how? For direct, or, if you will, true complicity, D must encourage or assist P's crime. But the doctrine applies even if D expressly discountenances P's further offence. It even applies if D, foreseeing the risk of the further offence, departs the scene of the initial offence.³³ This risk-based form of liability defies classification.³⁴ This is particularly so in those joint enterprise cases where joint enterprise doctrine is applied without proof of a joint

³¹ In *Gnango* (n.6), [42], in their joint judgment, Lord Phillips and Lord Judge confirm the joint enterprise doctrine in plain black letter terms without any doctrinal or normative gloss. In the bluntest of terms, if D agrees with P the commission of crime A, he will also be liable for crime B if he foresaw even a slight risk that P would go on to commit that crime in circumstances arising from the commission of crime A.

³² See the discussion at n.24, *ante*, and associated text. And see further *post*, n.103 and associated text.

³³ R. v. Rook [1993] 2 All E.R. 955 (Court of Appeal).

³⁴ See the excellent exposure of the rootlessness of joint enterprise doctrine by Kirby J. in *Clayton v. R.* [2006] HCA 58, (2006) 81 A.L.J.R. 439.

enterprise. There are cases where D's assistance to P in respect of crime A, a form of assistance that does not amount to a joint enterprise to commit crime A, will ground D's liability as an accomplice to P's crime B on the basis of D's foresight that P might commit crime B after finishing with crime A. In those cases where joint enterprise liability is imposed on plain accomplices,³⁵ the bounds of direct complicity are expanded, but without acknowledgement or justification of the change. One can only agree with Lord Bingham that liability under joint enterprise "lack[s] logical purity", and is based on "earthy realism."³⁶

The problem with realism rather than rules created from a sound doctrinal base is that it leaves no space to balance principle against pragmatism. The reception of the joint enterprise doctrine into international criminal law is instructive in this regard. In conflicts of considerable duration and wide geographical spread, large numbers of individuals, many well below command or officer level, are bracketed together as a joint enterprise. Activities at different times and far apart places may be given a questionable unity. Actual foresight of the crimes that other members of the joint enterprise might commit is not required. D is liable for the crimes of others that he should have foreseen, in addition to the crimes he participated in or foresaw.³⁷

B. The culpability for complicity

Turning to the *mens rea* of the accomplice, there are two aspects: the *mens rea* that D must have with regard to his own conduct at the time that he does it and the *mens rea* he must have with respect to P's conduct and P's state of mind, as and when P commits the crime.

In terms of his own conduct, at one time it seemed that D must act with the intention to assist P should P commit the crime.³⁸ Where D's intention was of the direct kind, uncertainty whether P would commit the crime, and if he did whether he would use D's assistance, was of no moment, provided D acted in order to assist P. Where the prosecution relied on oblique intention,³⁹ the prosecution

³⁵ See citations at n.30, ante.

³⁶ R. v. Rahman (n.24), [25].

³⁷ Robert Cryer et al., An Introduction to International Criminal Law and Procedure (2nd edn, CUP 2010), 367-374.

³⁸ R. v. Fretwell (1862) L.&C. 161 (Crown Cases Reserved). The idea that accomplices require a direct intention to assist the principal resurfaced in *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112 (House of Lords), but the decision is likely confined to cases where the alleged act of complicity is a bona fide medical intervention.

³⁹ It seems that oblique intention was received into the English law of complicity by the decision in *National Coal Board v. Gamble* [1959] 1 Q.B. 11 (Divisional Court), although as with many core issues in the law of complicity the matter is disputed:

would have to prove that D was sure that P would commit the crime and, if he did, he would use D's assistance. But it may now suffice that D is aware of the possibility that P might commit the crime and, were he to do so, he might use D's assistance. It may be that the classic requirement for intentional assistance has gone: recklessness may be enough.⁴⁰

Where the charge of complicity is based on encouragement, it seems that D must intend to encourage P in his crime and be aware that his encouragement has reached the notice of P. As the encouragement need have no impact on P, nothing further by way of *mens rea* is required from D in respect of his own conduct.

Turning to D's *mens rea* in relation to P's conduct, formerly, D's knowledge had to be of a very specific character, including circumstantial details relating to P's offence.⁴¹ That is no longer required. It is enough that D knows the type of crime that P has in mind; details of time and place are unnecessary.⁴² Further dilution of D's *mens rea* followed a ruling that D need not assume that one crime of a certain type was on P's mind. It sufficed for D to contemplate that a range of crimes might be on P's mind provided that the crime P committed was of a type within D's contemplation.⁴³ Indeed, it may be that it need not be proved that D assumed that P *would* commit one or more crimes: it may be enough that he assumed that there was a risk that P *might* commit one or more crimes.⁴⁴

Finally, turning to parasitic accessory liability, a.k.a. joint enterprise, the *mens rea* requirements outlined above in relation to D's own conduct apply only to the initial offence; there is no conduct element in relation to the further offence. Foresight of the possibility of the further offence committed by P is all that is required in relation to that offence.

G.R. Sullivan, "Intent, Purpose and Complicity" [1988] Criminal Law Review 641; Ian H. Dennis, "Intention and Complicity: a Reply" [1988] Criminal Law Review 649.

⁴⁰ There are many cases where recklessness appears to be the standard applied, but the circumspection in the text is necessary because sometimes in the case law, D, though lacking a direct intent to assist P, is said nonetheless to intentionally assist P on the basis of foreseeing that P might commit an offence with his assistance. In other cases such a state of mind is more accurately described as a case of recklessness. Clarity is not assisted by the fact that, in cases concerned with direct complicity, dicta from parasitic complicity cases are cited. In the latter form of complicity, a recklessness standard clearly applies. The Court of Appeal's judgment in R. v. Bryce (n.27), a case on direct complicity, contains these kinds of imprecisions. For an excellent account of the vagaries of this unstable case law, see the Law Commission, Participating in Crime (n.14), paras 2.42-2.97.

⁴¹ R. v. Lomas (1914) 9 Cr. App.R. 220 (Court of Criminal Appeal).

⁴² R. v. Bainbridge [1960] 1 Q.B. 129 (Court of Criminal Appeal).

⁴³ Director of Public Prosecutions for Northern Ireland v. Maxwell [1978] 1 W.L.R. 1350 (House of Lords).

⁴⁴ Law Commission, *Participating in Crime* (n.14), paras 2.64-2.66.

C. Complicity and punishment

As in the eyes of the law accomplices and principals are both guilty of the same crime, committed at the same place and time, and in the same circumstances,⁴⁵ in terms of sanction, the default position for principals and accomplices must be that each should be subject to the same punishment. That would certainly be the case for joint principals. To justify that approach for pairings of principals and accomplices, there must be a coarse grained equivalence between the accomplice and principal, both in terms of the accomplice's own conduct, and associated culpability and the impact of his conduct on the occurrence of the primary wrong. The current law of complicity cannot deliver this equivalence with any consistency.

The principal will establish the baseline. He, at least, will satisfy the conduct and culpability elements that the offence requires. Although the wrong is directly perpetrated by P, D's conduct should play a part in the history of P's crime, sufficient to establish what Honoré has termed "outcome responsibility" in respect of it.⁴⁶ Only if D's contribution is of this order does it make doctrinal and moral sense to make D guilty of the same crime as P.

Of course, it may well be that, on occasion, it will be appropriate to depart from this default position. It may be perfectly fair and just to convict D and P of the same offence but to punish one of the defendants more severely. The ruthless D may have pressurised the weak willed P into committing the offence, making a lighter sentence

⁴⁵ Where encouragement or assistance is given by D to P prior to the commission of the offence, there may well be separation in time and place between the conduct of D and the commission of the offence by P. Nonetheless, D is not liable for the offence until it is committed by P and his liability arises at the time and place of commission. Consequently if D assists P in Scotland in relation to an offence committed in England, D becomes liable at the time and place of the offence and is amenable to English criminal jurisdiction: R. v. Robert Miller (Contractors Ltd) [1970] 2 Q.B. 54 (Court of Appeal).

Tony Honoré, Responsibility and Fault (Hart 1999), 7-40. For Honoré the most obvious form of outcome responsibility arises when an agent is causally responsible for the outcome at issue. It will be argued, post, that outcome responsibility is not necessarily confined to cases of causality. What should be stressed is that outcome responsibility must rest on some material relationship between the agent and the wrong. In our context of complicity, it is not enough for outcome responsibility on the part of D that he approves of P's wrongdoing and even plans to take some benefit from it. There must rather be some real-world linkage between what D has done or omitted to do and the instantiation of the primary wrong. Without that, it is incoherent to treat D on the same terms penally as if he had committed the primary wrong. Where D's association with P's wrong is insufficient for outcome responsibility but is nonetheless morally reprehensible and conducive to the commission of crimes, there will be a strong case for criminalisation of his conduct on the basis of some form of inchoate liability, a form of liability now provided for in English Law.

appropriate for P. More often the case is a large divergence in gravity between the conduct of the accomplice contrasted with the conduct of the principal, a divergence best addressed by examining the facts of decided cases.

Dealing first with situations where D's complicity takes the form of assistance to P, as discussed, D's contribution need not be causal nor even significant. Take the case of R. v. Bryce,⁴⁷ where D gave a short lift to P on his motorbike to the house where P lived. V resided in a caravan on a site close to P's house. D was aware that P had been ordered to kill V by their boss, the drug dealer S. The prosecution accepted that when D dropped P off, P was reluctant to obey S and had yet to decide what to do, an indecision of which D was aware. Some thirteen hours after the lift, following an intervening visit from S who reminded him of his responsibilities, and shortened the barrels of his shotgun, P shot and killed V. Now, it was clearly more convenient for P to ride rather than walk to the vicinity where ultimately he killed V. That assistance was enough to make D guilty of murder.

Where D's conduct takes the form of encouragement, there need be no impact whatever on P's crime.⁴⁸ This has been extremely useful for prosecutors in cases of spontaneous outbreaks of multiparty violence. Supporters of rival football teams, A and B, with an historic enmity, meet by chance, and a confrontation ensues. Two of the rival supporters start fighting each other and some of the others on each side pile in. V, a supporter of Team A, is killed by one of the Team B supporters, who used a knife in a way indicative of an intent to cause serious harm. But no-one knows or is saying which Team B supporter it was, and the knife is untraceable. prosecution are able to identify a cohort of Team B supporters who were present at the crime scene, and who may or may not have fought with Team A supporters. If the prosecution can persuade a jury that, at the very least, each of these Team B supporters remained in the vicinity of the fight to support their mates, that will be enough to prove encouragement by presence,⁴⁹ and the whole cohort can be convicted of affray on the basis that they must be either principals or accomplices in that offence.⁵⁰ More importantly, they are all parties to a joint enterprise between the Team B supporters to commit an affray. Some or all can be convicted of V's murder if it is proved in respect of any particular defendant that, when becoming a party to

⁴⁷ (n.27.)

⁴⁸ Recently confirmed in R. v. Luffman [2008] EWCA Crim 1752.

⁴⁹ Robinson v. The Queen [2011] UKPC 3, [2011] 4 L.R.C. 231.

⁵⁰ It is long established that D may be convicted for an offence if on the evidence he must either be a principal or an accomplice: *Mackalley's Case* (1611) 9 Co. Rep. 65b (Court of Queen's Bench).

the affray, he foresaw a risk that one of his mates might intend serious violence by use of a knife.

In the case of R. v. Gnango,51 direct complicity based on encouragement was given a significant new twist, a development which, if exploited by prosecutors, will further expand the bounds of complicity. D successfully appealed his conviction for murder, a conviction based on the theory that, by exchanging gunshots with P in a public place, he had formed a joint enterprise with him to commit an affray. On the basis of this theory, D was a party to a shot from P aimed at him but which killed V, a passerby. The theory was quickly demolished by the Court of Appeal⁵² and was not resurrected by the Supreme Court. Yet D's murder conviction was restored. One branch of the majority, Lord Phillips and Lord Judge (Lord Wilson agreeing), found in their joint judgment that D was a true or direct accomplice of P's on the basis that he had encouraged P Applying the principle inaptly called transferred to shoot at him. malice.⁵³ their Lordships found that D was a party to P's murder of V. The case merits close attention as no case better illustrates the fragility of the rules relating to complicity when judges are convinced that public confidence in the criminal justice system requires a conviction for murder.

The reports of *Gnango* reveal little of the history between D and P which culminated in the exchange of shots. It seems P owed D money and D was seeking him out. P, on seeing D first, shot first. Mr Justice Cooke directed the jury that they could find D guilty of V's murder on the basis of a joint enterprise with P to commit an affray if they found a prior agreement or a spontaneous agreement made on the spot to engage in a shoot-out. As Lord Kerr observed in his compelling dissent, this direction invited the jury to make findings unsupported by evidence.⁵⁴ There was no evidence at all of a prior agreement to resolve conflict by gunfire and the sudden exchange of shooting did not imply any agreement made on the spot: the two antagonists saw each other, P shot first, and D shot back.

⁵¹ (n.6.) This case was also reported in this journal: Atli Stannard, "Securing a Conviction in Crossfire Killings: Legal Precision vs. Policy" [2011] J.C.C.L. 299.

⁵² R. v. Gnango [2010] EWCA Crim 1691, [2011] 1 W.L.R. 1414.

This criticism cannot be developed here. Suffice to say if there is need of such a principle, it should be called transferred *mens rea*. But such a principle is surplus to requirements. The true legal issue in cases where the principle is applied is whether there is a coincidence of *mens rea* and *actus reus*. Where the *actus reus* occurs in an unexpected way, yet the event in abstract terms remains within the scope of D's *mens rea*, issues of fair causal attribution may arise. No such complication arises on the facts of *Gnango*, as the killing of V was just the sort of thing one would expect to happen if gunshots are exchanged in a public place.

⁵⁴ Gnango (n.6), [115], [121].

At trial Mr Justice Cooke confined the prosecution to a submission based on joint enterprise. He refused an argument based on direct as opposed to parasitic complicity, on the basis that any agreement to engage in a shoot-out did not make for any agreement between D and P in the matter of killing each other. Their respective intents to that end were mutual, contemporaneous but antagonistic. The Court of Appeal accepted this analysis and ruled out any liability based on direct complicity.

Lord Phillips and Lord Judge begged to differ. They surmised that the jury's finding of an agreement between P and D to have a shoot-out was by its very nature something akin to a duel, an agreement, "to shoot and be shot at". 55 An agreement of that kind was an encouragement to P by D to shoot at D and *vice versa*. On that reasoning, D was a party to the shot which missed him but hit V. The potential of this judgment is startling. P, a bully, challenges the much smaller and passive D to a fist fight, a challenge that D reluctantly accepts because he does not want to lose face in front of his girlfriend. D is badly beaten and P is charged with an offence that reflects the serious harm he did to D. And D is charged as P's accomplice in the same offence. 56 What punishment D should receive for this serious offence is open to conjecture.

If English law had insisted that accomplices must have a direct intention to encourage or assist the crime of the principal, almost invariably there would be true community of purpose between D and P. When that kind of relationship exists there can be much less concern about the different parts that D and P play in bringing about the primary wrong. If D and P hatch a plot to kill V, there will be no qualms about finding D guilty of murder even though D did the driving and P did the killing. They have very different roles but their collaboration makes for parity of culpability.

The crucial departure from the acting in concert model for complicity came with the decision in *National Coal Board v. Gamble*,⁵⁷ where a strong but divided Divisional Court ruled that an oblique intent on the part of D, a weighbridge operative, to assist P's crime of driving an over-weight load on a highway was enough to make him a

⁵⁵ *ibid*. [57]-[59].

be hit;" on the reasoning of Lord Phillips and Lord Judge, each man would be a party to the blows his opponent aimed at him. To be sure, this reasoning was deployed to fix liability on D for the death of V, but the reasoning carries over to harms suffered by the opponent, particularly as their Lordships found, correctly, that D was not a victim within the scope of the rule in R. v. Tyrrell [1894] 1 Q.B. 710. A consensual fight outside a sporting context is, of course, an assault on the part of each participant: Attorney General's Reference (No. 6 of 1980) [1981] Q.B. 715 (Court of Appeal).

⁵⁷ (n.39.)

party to the driver's offence. If there need be nothing in the way of a community of criminal purpose with P, persons such as weighbridge operators and taxi drivers, in the routines of working life, may find themselves pressurised or manipulated into assisting P's crimes, sometimes dreadful crimes⁵⁸ without any pre-disposition to become involved in such wrongdoing. Furthermore, the attenuation of the *mens rea* requirement has continued since *Gamble*. In the under theorised jurisprudence of English complicity law, it is difficult to be precise about where things stand in relation to the *mens rea* for complicity. But there is good reason to think that English law now accepts recklessness on the part of D as to the effect of his own conduct and the future conduct of P as a sufficient form of *mens rea*.⁵⁹

D. Why an expansive law of complicity?

In accounts of the virtues of the English criminal justice system, the neutrality of prosecutors and judges concerning the outcome of criminal cases is taken to be a prime value.⁶⁰ An acquittal is not a system failure. If a defendant is acquitted by raising a reasonable doubt on the basis of unperjured evidence, it shows that the presumption of innocence is working well. If conduct thought likely to be criminal by a prosecutor is shown to fall outside the bounds of the offences charged, this demonstrates that criminal law is a system of stable rules and not ad hoc judgments on the day. At least in public, officials of the criminal justice system would not challenge these claims to a restrained and principled criminal law. And yet prosecutors and judges also conceive of themselves as guardians of public safety and security. As public safety and security are utterly legitimate concerns for public officials and judges, there is an inevitable tension between adhering strictly to legal principles and legal values, and the perceived practical realities of securing safety and security.⁶¹

Outside terrorist and other organised threats to the general security, this tension rises to the surface most obviously in cases of serious outbreaks of multi-party violence. In the case of the two defendants found guilty of the murder of Stephen Lawrence,⁶²

⁵⁸ DPP for Northern Ireland v. Lynch [1975] AC 653.

⁵⁹ See n.40, ante, and associated text.

⁶⁰ Patrick Devlin, The Criminal Prosecution in England (OUP 1960).

⁶¹ For exploration of various dimensions of this tension, see G.R. Sullivan and Ian H. Dennis (eds), *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart 2012).
62 A case of the murder of a young black British man which received considerable press coverage, caused public outrage, and led to an inquest and a public inquiry, four years after the events. The police investigation was bungled, and the first prosecution dropped. At the inquest, the five suspects refused to answer any questions, claiming privilege against self-incrimination. This case led to the enactment of the *Criminal Justice Act* 2003, s.75, permitting retrial for certain serious

the most that could be proved against either defendant was that they were present at the initial attack on Stephen in support of the assailants, and foresaw the possibility that an assailant might seriously hurt Stephen with intent to do so.⁶³ There is a great deal of content with these murder convictions, not least because of a widely disseminated video recording, ruled admissible at trial, which showed these defendants to be virulent racists. It is not unreasonable to consider that these long-sought convictions completely vindicate the joint enterprise doctrine.

Yet it remains disturbingly the case that most murderers are not convicted on the basis that they intended to kill or cause serious harm, but rather foresaw a risk, even a slight risk, that someone else would kill or cause serious harm. And of course most joint enterprise cases do not involve a racist, multi-party attack with knives on a defenceless child victim. More typical is the sudden outbreak of fighting between antagonistic groups of young adult and teenage males - as in the Team A-against-Team B scenario above. As David Ormerod observes, 64 although the term joint enterprise is suggestive of a planned offence, the expanded basis of liability based on joint enterprise "is readily applicable to the spontaneous conduct of two or more without pre-planning." The large numbers of murder convictions based on joint enterprise arising from such circumstances are a cause for concern. Many young men are serving life sentences for doing little more than being in the wrong place at the wrong time. 65

The majority of the Supreme Court justices in *Gnango* were committed to marking the tragic death of V with a murder conviction. The sentiment is entirely understandable. Magda Pniewska was making her daily walk home from work, talking to her sister by phone when she was killed as a collateral victim of a likely drug commerce quarrel. The most forceful expression of this sentiment comes from Lord Brown:

offences – a qualification of the "double jeopardy" rule. Two of the five suspects were then convicted at retrial in 2011-12 (Vikram Dodd, Sandra Laville, "Stephen Lawrence verdict: Dobson and Norris guilty of racist murder" *The Guardian* (London, January 3, 2012), http://bit.ly/Dobson Norris conviction Guardian accessed November 20, 2012) – which conviction they unsuccessfully appealed to the Court of Appeal.

⁶³ R. v. Dobson [2011] EWCA 1255, [2011] 1 W.L.R. 3230. The evidence on which the Court of Appeal ordered a retrial did not include evidence on which the defendants might be found guilty of murder other than on the basis of joint enterprise liability for a collateral offence.

^{64 (}n.13), 226,

⁶⁵ The campaigning group *Justice for Families* have an informative data base giving the circumstances of many prisoners serving life sentences for murder based on joint enterprise: http://www.justice-for-families.org.uk> accessed November 20, 2012.

"The public would in my opinion be appalled if in those circumstances the law attached liability for the death only to the gunman who fired the fatal shot (which, indeed, it will not always be possible to determine). Is he alone to be regarded as guilty of the victim's murder? Is the other gunman really to be regarded as blameless and exonerated from all criminal liability for that killing? Does the decision of the Court of Appeal here, allowing [D's] appeal against his conviction for murder really represent the law of the land?"

Even if one had confined one's reading to that early part of his lordship's judgment, one would know what the outcome of his judgment would be. But, until enlightened by Lord Brown, it was far from obvious that D was a murderer. It was obvious that P was a murderer, but given the vagaries of the criminal justice system he was never brought to book.⁶⁸ For a prosecutor determined to press for a murder conviction against D, it was worth taking a punt on joint enterprise. But once that usually trusty sword had buckled, many criminal lawyers would have agreed with the Court of Appeal that it was game over as far as a murder verdict against D was concerned. It was startling to learn from Lord Phillips, Lord Judge and Lord Wilson that D was complicit in shots fired at him by P and, by that token, complicit in P's murder of V. And even more startling to learn from Lord Brown and Lord Clarke that he was a principal in V's murder just as if he had shot V himself.⁶⁹

But there is more to the resilience of a wide-ranging law of complicity than a concern to bring violent persons to book. Even persons well-disposed to the idea of a precise and stable criminal law, based on retributivist principles, may yet take in their

⁶⁶ D was contesting his conviction for murder. He was not contesting his convictions for attempted murder and possession of a firearm with intent to endanger life. So the stakes were not quite as high as set by Lord Brown. On this point, see Stannard (n.51), 308-309.

^{67 (}n.6), [68].

⁶⁸ P was arrested and questioned for two days, then released and not re-arrested.

⁶⁹ The surprise is not at the very idea shared by Lord Brown and Lord Clarke that a party to a joint enterprise might through his membership be a non-perpetrator principal to the offence agreed, provided he has the culpability for the offence. Indeed the idea will be defended below. The surprise arises from the fact that they did not appear to know that on the state of the authorities in English law, the predominant view is that the only way to be a principal is to be a perpetrator – a view forcefully expressed in Glanville Williams' paragraph quoted by Lord Bingham in Kennedy (No. 2) (n.26), and in that judgment generally. Neither Lord Brown nor Lord Clarke cited Lord Bingham, although he said what he said very recently and in a judgment focused on the origin and scope of the joint enterprise doctrine. There are some cases to hand to test the opinion of Lord Bingham – see n.106, post, and associated text – but they are not cited in the judgments. Lord Brown's judgment is very brief and is suffused with the sentiment that he is dealing with a simple matter which has already taken too long to resolve.

stride complicity in its widest forms. If D encourages or assists P in his crimes, or associates himself for bad reasons with a volatile P who may suddenly turn seriously violent, D is in poor moral case. And the worse P's crime, the worse D's moral standing. The potency of guilt by association can best be illustrated by reference to encouragement as a form of complicity. Recall that under this form of complicity, the threshold for liability is set remarkably low. It is not necessary for D to have a stake in P's crime. It is enough for D to manifest his approval of P's crime before or during its commission. It suffices that P is aware of D's words or gestures of encouragement. It is immaterial should D's encouragement of P have no effect whatever on P's present or future conduct. Notwithstanding the complete lack of impact the encourager's conduct may have, D will be guilty of any crime that P commits which corresponds with or is similar to the crime that D has encouraged.⁷⁰ While there can be no objection to proscribing the encouragement of crimes as a form of complicity in cases where the encouragement has a material and positive impact on the commission of P's crime, or where the crime is a project that D shares with P and in lesser cases as a basis for statutory inchoate liability, it is highly questionable to impose full liability for the crime itself on the basis of what may amount to no more than a positive disposition on the part of D to P's crime.⁷¹

In cases of mere encouragement without material effect, the morally disreputable attitude of D to P's wrongs is doing too much work in generating D's liability for the crimes of others. As a matter of principle, full accountability for a wrong, whether perpetrated by oneself or by someone else, requires responsibility for the wrong in terms of a material, in the world connection with the events that constitute the externalities of the crime, and culpability commensurate with the blame and censure associated with its commission. Liability based on complicity regularly entails criminal convictions for the full crime in the absence of any material responsibility for the crime and with a culpability of a lesser dimension than is required for the principal. The current forms of complicity are likely to endure in England and Wales, but there is a better way.

⁷⁰ To paraphrase the judgment of the Court of Appeal in R. v. Calhaem [1985] Q.B. 808.

⁷¹ See references at n.27.

⁷² For an elaboration of this argument see G.R. Sullivan, "First Degree Murder and Complicity – conditions for parity of culpability between principal and accomplice" [2007] Journal of Criminal Law and Philosophy 271, 279-281.

III. FROM DERIVATIVE TO DIRECT LIABILITY

As Joshua Dressler has demonstrated so well,⁷³ overreaching complicity is common in Anglophone jurisdictions. Liability based on a derivative model, mediated through a wrong exclusively attributed to the conduct of another, gives rise in many jurisdictions to doctrinal disputes about the sufficiency of the conduct element and the mental element needed to make D an accomplice to the crime.⁷⁴ Added to this is a stream of appellate case law on the nature and limits of the collateral offence joint enterprise doctrine.⁷⁵ Anglophone complicity is a complex body of law, frequently litigated, with a persistent dynamic for over-criminalisation.

It may be time for a new approach in the matter of perpetrators of criminal wrongs and for associated non-perpetrators who share commensurate or even greater responsibility than the perpetrator for the commission of the wrong. Instead of asking, "where does D stand in relation to P in respect of the wrong perpetrated by P," there should be a more straightforward inquiry about where D stands in relation to the wrong itself. In other words, when the issue at stake is liability for a fully realised criminal offence, such as a rape or a murder, liability in the form of a conviction for such offences should take the form of direct and not derivative liability. Technically, this approach requires abolishing complicity as a legal form of liability and, normatively, enlarging the class of those who may be regarded as principal offenders.

It will be argued that, in terms of the conduct element of an offence, persons who currently would not be principal offenders on the basis that they were not, physically, direct perpetrators of the actus reus, may yet be candidate members of the class of principals, if their own conduct, considered of itself, establishes outcome responsibility for the primary wrong. The most obvious form of outcome responsibility will arise if D's conduct stands in a more than minimal causal relationship to the crime, but consideration must also be given to circumstances where a non-causal association with the wrong may establish outcome responsibility. Should outcome responsibility be established against D in respect of the crime at issue, liability will follow as a principal offender if, and only if, D has the culpability specified for the offence. It will be contended that,

⁷³ "Reforming Complicity Law" (n.11); "Reassessing the Theoretical Underpinnings of Accomplice Liability" (n.20).

⁷⁴ For example, see the dispute between Dennis and Sullivan concerning the correct reading of the case law on the mental element for complicity, referenced at n.39, and the contribution to that debate in Williams, "Complicity, Purpose and the Draft Code – Part 1" [1990] Criminal Law Review 4.

⁷⁵ See Simester (n.28), and Law Commission, *Participating in Crime* (n.14), paras B.118-B.152.

provided inchoate offences of encouraging and assisting crime are to hand,⁷⁶ the field of doing and sharing criminal wrongs will be fully and better mapped than is currently the case, at least for the jurisdiction of England and Wales.

But in order to be in a position to argue this case, two important matters must be resolved. The liability scheme that will be proposed rests on two contestable assumptions. First, it will be argued that, in certain circumstances, the fully informed and voluntary conduct of one human agent may, despite its freely chosen nature, be caused in a more than *de minimis* sense by a prior or present intervention on the part of another human agent, even if the intervention takes a non-coercive or non-deceptive form. Secondly it will be argued that even for crimes which require some form of physical engagement at the point of commission, the class of principals can be enlarged to include persons in addition to the perpetrator. If either argument fails, then retention of the class of accomplices is a conceptual necessity and a moral imperative if the field of wrongdoing in relation to consummated crimes is to be adequately covered.

A. Causation and voluntary conduct

If P's conduct was uninfluenced by any duty, coercion or deception, generally English law considers his conduct to be based on an autonomous choice, free of any causal influence by any other human agent. For instance, if P initially considered killing V but decided against it but then was later cajoled by D into the killing of V by appeals to his courage, the promise of a large sum of money, a gift of a gun and what seemed an impregnable alibi, in legal terms the sole causal agent involved in V's death is P. In conversation it would be perfectly natural to speak of both D and P bringing about V's death. But English law mainly has it otherwise; only P is the causal agent and thus only P is a principal in the offence; D is liable for murder, but as the accomplice of P.

English law has been much influenced by the famous "ordinary language" account of causation of Hart and Honoré.⁷⁹ The strength of this influence was recently confirmed by Lord Kerr in *Gnango* who cited the following passage from their seminal work:

"The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the

As is now the case: Serious Crime Act 2007, ss.44-66.

⁷⁷ R. v. Latif [1996] 1 WLR 104 (House of Lords).

⁷⁸ There has been some recent doctrinal instability in this area, discussed *post*.

⁷⁹ H.L.A. Hart, Tony Honoré, Causation in the Law (2nd edn, OUP 1985).

first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."80

Lord Kerr approved this passage⁸¹ in the following terms, "This statement was cited by the House with approval in R. v. Latif. The principle is fundamental and not controversial."⁸²

To adopt, for the purposes of the criminal law, the convention that the consequences arising from P's free and informed choices are causally attributable to him alone, is to adopt a convention concerning the allocation of responsibility for criminal wrongs. It is not a causal statement as such, because causal propositions in order to be causal propositions must assert some factual claims open to empirical challenge even if the final attribution of causal status to a putative cause may include elements of normative and metaphysical reasoning.⁸³ A normative proposition that only the direct perpetrator of the wrong should be regarded as the principal offender is certainly defensible in normative terms. But any defence of that proposition as a factual proposition must claim that a direct perpetrator, when acting in a free and informed manner, is the only human agent in the causal history of the wrong. A factual claim of that kind must be justified in terms of the aetiology of human action.⁸⁴

There is a broad acceptance that the conduct of human agents is responsive to their first order preferences, preferences which guide and inform second order practical reasoning. If the Hart and Honoré position on free, informed choice as an uncaused choice is read as a factual claim, ⁸⁵ it asserts that, all other things equal, the choices of free and informed agents are uninfluenced in causal terms by the past or present interventions of other human agents, unless those interventions took a deceptive or coercive form. For instance, going back to the interchange between D and P sketched above, the process culminating in P shooting V would have to be reported along the following lines: before D's intervention P was inclined but had not resolved to shoot V. After D's intervention he was resolved to shoot V. D's change of mind was not causally influenced even in part by P. A full defence of the Hart and Honoré position in the

⁸⁰ ibid., 362. Lord Kerr in fact cited Lord Bingham in Kennedy (No. 2) (n.26), who cited that work.

⁸¹ Still citing Lord Bingham in *Kennedy (No. 2)* (n.26), [14], who in turn referred to Lord Steyn in *Latif* (n.77), 115.

⁸² Gnango (n.6), [131] (emphasis added, in-line reference omitted).

⁸³ Nancy Cartwright, "From Causation to Explanation and Back" in Brian Leiter (ed.), *The Future of Philosophy* (OUP 2004), 230.

⁸⁴ Alfred R. Mele, "Action" in Frank Jackson and Michael Smith (eds), The Oxford Handbook of Contemporary Philosophy (OUP 2005), 334.

⁸⁵ Hart and Honoré were not of course putting forward a claim about causal events in the natural world.

realm of facts about human agents and their bodily movements must offer an explanation of how interventions from other human agents which have, as in the case of D and P, clearly influenced another agent's choices, bring that influence to bear in some non-causal way.

But there can be other factual reports which fix responsibility for the wrong on the perpetrator while acknowledging the causal influence of others in bringing about what has been done. This enlarges the circle of causal responsibility and in that sense shares out direct responsibility for the wrong but without dissipating the responsibility of anyone within the causal circle. P now rues the day he met D because he knows that, but for the influence of D, he would not have killed V, and he would not now be serving a long prison sentence. He may accept his own responsibility and blameworthiness. He may even be contrite. But his bitterness about the intervention of D is not passing the buck: it is based on the reality of events. He made a free choice to kill V, but a *sine qua non* of his choice was the intervention of D.

Even among theorists who insist that principals to criminal wrongs should be confined to free and informed perpetrators, there is universal acceptance that other agents may share responsibility for the wrong. They can only be accessories. But the fact these accessories cannot doctrinally have causal responsibility for the principal wrong entails that there need be no causal responsibility in factual terms either. That is a major reason why the class of accessories is so wide. Because confining principals to perpetrators rests on normative grounds rather than fact of the matter causation, it would make sense to have a more fact based take on the causal history of criminal wrongs if better normative results will arise.

Despite Lord Kerr's recent endorsement, with Lord Bingham, of the Hart and Honoré position as fundamental and non-controversial, broader views of causation consistently surface in the case law. For over a decade the Court of Appeal frequently held that a supplier of illegal drugs may commit manslaughter if a person to whom he supplied drugs died as a consequence of taking the drugs supplied.⁸⁶ The doctrine that free choices are wholly uncaused by others was reasserted in the firmest of terms by a unanimous decision delivered by a composite judgment of the House of Lords in R. v. Kennedy (No. 2),⁸⁷ ruling that a heroin addict desperate for the drug had taken the drug voluntarily and thereby was the sole author of his death. Not long before Kennedy (No. 2), the House of Lords in Empress⁸⁸

 $^{^{86}}$ Timothy H. Jones, "Causation, Homicide and the Supply of Drugs" (2006) 26 Legal Studies 139.

⁸⁷ (n.26.)

⁸⁸ Environment Agency v. Empress Car Co (Abertillery) Ltd [1999] 2 A.C. 22.

decided that P Ltd had caused pollution to an inland waterway by (quite legally) storing oil close to a river. This finding was made despite the fact that the immediate cause of the pollution was a voluntary act of trespass by some unidentified third party who had broken into the compound where the oil was stored. It was reasonable to think that the decision in *Empress* might well have been different had the chronology of the two House of Lords decisions been reversed. Kennedy (No. 2) seemed to be the leading case. However, in R. v. Williams⁸⁹ and in R. v. H,⁹⁰ the Court of Appeal preferred Empress to Kennedy (No. 2) when construing the offence of causing death by driving when unqualified to drive. In R. v. Gnango, Lord Clarke was of the considered opinion that the free choice of P to shoot at D91 was caused by D shooting at him.92 There is no reason in principle why English law could not accept for general purposes that fully voluntary conduct may yet be caused at least in part by third party interventions.93

B. Principals and intransitive wrongs

The commission of certain wrongs require physical presence and forms of direct involvement. The wrong of rape affords an obvious example. Take D, an army commander, who has decided that the terror campaign against the local population will include the rape of women. He orders a detachment of his soldiers to capture and rape women and threatens to shoot any soldier who fails to carry out this order. He has a point of a sort should he demur at a description of himself as a rapist. If the jurisdiction in question does not allow a defence of duress to the soldiers who rape women in such circumstances, then at least the commander can be brought to book as the accomplice of his men. But what if the men can defend a charge of rape with the defence of duress? Allowing the defence to

^{89 [2010]} EWCA Crim 2552, [2011] 1 W.L.R. 588.

^{90 [2011]} EWCA Crim 1508, [2011] 4 All E.R. 761.

⁹¹ P was not acting in self defence but participating in a mutually aggressive exchange of gunfire.

⁹² Gnango (n.6), [83]-[91]. Lord Clarke did not cite Kennedy (No. 2) (n.26).

⁹³ Which is not an endorsement of all the decisions cited where a broader view of causation was taken. In particular the decisions in *Williams* and *H* are very debatable because in each of the cases V was held to be 100 *per cent* responsible for the collision that caused his death: G.R. Sullivan and A.P. Simester, "Causation Without Limits: Causing Death While Driving Without a Licence, While Disqualified, or Without Insurance", [2012] Criminal Law Review 753. But surely Lord Clarke is correct to find that that in factual terms D caused P to fire at him if P would not have done so had not D fired at him. That does not imply further agreement with Lord Clarke that D was thereby a party to the shots fired at him.

⁹⁴ Incidents of this kind have been reported in recent times from conflicts in Former Yugoslavia, Rwanda, Sudan, and the Democratic Republic of Congo.

run does not mitigate to any degree the wrong done to the women: they were indubitably raped. If the rapists themselves are acquitted, what further legal response can there be to this dreadful crime? Applying it by the book, the law of complicity causes difficulty. As the liability of the accomplice is derived from the crime of the perpetrator, in the absence of a crime by the latter, there is no criminal liability to pass on to the accomplice.

The best solution, surely, is to treat the commander as a principal in the crime of rape. The responsibility for instigating the wrong of rape lies squarely with him. To be sure, personal participation in the rape of the women would have added an additional layer of turpitude to his conduct. But even without that, he is steeped in the crime. Moreover, to describe him as the accomplice of his men strikes a false note. The rape atrocity was his project. The men he ordered and coerced into committing rape were his minions. He bears outcome responsibility for the rapes in the most obvious form of causal connection. As a technical matter of legal drafting, it is perfectly feasible to provide that one can be a principal in the crime of rape, or any other intransitive wrong, despite not being the physical perpetrator of the offence:

Causing or agreeing to commit an offence%

- (1) If D causes P to commit an offence or agrees with P that P will commit an offence, D is guilty of that offence.
 - (2) D causes P to commit an offence—
 - (a) if his act makes more than a negligible contribution to the occurrence of P's criminal act, and
 - (b) he intends to cause P to do a criminal act in relation to the offence, and
 - (c) subsection (5) is satisfied;

⁹⁵ Liability for rape is consistently found in analogous circumstances in English law, as in R. v. Cogan [1976] Q.B. 217 (Court of Appeal) and D.P.P. v. K. and B. [1997] 1 Cr.App.R. 36 (Divisional Court). The conceptual explanation varies. Sometimes it is said that the presence of the external elements of the crime is a sufficient predicate for derivative liability as an accomplice, sometimes it is said that the coercive or deceptive D is the principal offender, despite the lack of any personal carnal connection with V. The analysis may vary according to whether P lacks the fault element of the offence (as in Cogan, where D duped P into thinking that V was consenting) or where P has the fault elements for rape but has a personal defence, such as the defence of the presumed incapacity of boys under 13 (since rescinded) as in the D.P.P. case.

⁹⁶ This legislative proposal is influenced by clause 4 of the Law Commission for England and Wales's draft Bill, in *Participating in Crime* (n.14) 156-161, 158. The Law Commission's provision deals with the situation where the *actus rens* of an offence is perpetrated by an innocent agent. Even in that limited form the Commission's proposal would impose liability as a principal on D for intransitive crimes such as rape without proof of an act of penetration on his part.

and, for the purposes of paragraph (a), D's act may be found a more than negligible contribution to the occurrence of P's criminal act irrespective of whether P's criminal act is freely chosen by P.

- (3) D agrees with P to commit an offence—
- (a) if he agrees with P that P will do a criminal act in relation to the offence, and
- (b) he intends that P will do a criminal act in pursuance of the agreement, and
- (c) P does a criminal act in pursuance of the agreement and,
- (d) subsection (5) is satisfied.
- (4) For the purposes of this section, P does a criminal act in relation to an offence if he does an act (or failure to act) that falls within the definition of the act (or failure to act) that must be proved in order for the person to be convicted of the offence.
- (5) If a particular state of mind requires to be proved for conviction of the offence that D causes P to commit or agrees that P will commit, D's state of mind must be such that, were he to do the act that he intends to cause or has agreed to be done, he would do it with the state of mind required for conviction of the offence.

Such a scheme of liability should work smoothly in our army commander example. Should his men have a defence of duress, the commander would be the only principal offender, on the basis that he caused his men to rape. Should his machinations fall short of duress but secure the agreement of his men to rape the women, he would satisfy the subsections relating to agreements to commit crimes and be a joint principal with his men (that agreement to commit crimes generates outcome responsibility for the commission of the offences agreed will be argued in the next section).

But John Gardner's insistence that only the physical perpetrator can be the principal in a non-transitive wrong must be confronted again:

".....there are many actions that *do* consist in making a causal contribution to something, but which also have the feature of being nonproxyable, because the causal contribution is a refined one. [Killing, torturing, coercing, enslaving, inducing, destroying, igniting] and countless other action-types. Where nonproxyable actions are wrongs *per se* or necessary ingredients of more complex wrongs, one cannot be a principal in these wrongs by making one's causal contribution through another principal. In such cases, who acts through a principal must be an accomplice. So in such cases the

attempt to eliminate complicity from the moral landscape, in favour of a more capacious domain of principalship, fails."97

Gardner's argument appears conceptual rather than normative. If it means nothing more than observing that the commander cannot become a rapist *per se* by coercing his men into committing rapes, one can only agree. But it seems he intends to convey more than that. He is stipulating that, for nonproxyable wrongs such as rape, it is a category error to find anyone other than the rapist guilty as a principal to rape. It may be conceded that the term rapist should be confined to the male who penetrates V. Likewise the term "killer" should be confined to persons who shoot, knife, strangle, *etc.* The argument in opposition to Gardner is that persons in addition to killers can be coherently found guilty as principals to the *crime* of murder. And that argument carries over to the crime of rape despite the fact that rapists can only rape by penetrating non-consenting victims.

Insisting that principals in rape must be confined to rapists may exact a high price. If the soldiers do have a defence of duress, under Gardner's strictures, the commander cannot be made the principal. As it is inconceivable that he should go unpunished, and if there is no other crime that he has committed reflective of the great wrong he has done, 98 somehow he has to be made an accomplice to his men's rape of the women. This will put great stress on the derivative model of complicity in its application to a non-proxyable offence. Normatively and conceptually it would be better to take a more capacious view of principals. In addition to perpetrators, the class of principal offenders should accommodate all other persons with outcome responsibility for commission of the crime and with the *mens rea* required for conviction of the crime.

IV. Doing Without Complicity – an Outline

One of the tasks undertaken here has been to demonstrate that voluntary wrongdoing by P can in a more than *de minimis* sense be caused by some prior or concurrent intervention of D, even if D's intervention is non-coercive or non-deceptive. In other words, such an intervention by D may be one of a necessary set of conditions sufficient to cause P to commit a particular wrong. If this has been demonstrated to be the case, the way opens to dispense with complicity and make all criminals principals. Conviction for any crime would require proof that P had outcome responsibility for the *actus reus* of

⁹⁷ Gardner, (n.15), 141.

⁹⁸ The commander may well be guilty of a war crime or a crime against humanity if appearing before the International Criminal Court or one of the *ad hoc* tribunals applying the principles of international criminal law. If before a domestic court, charges of rape may be more appropriate.

the crime. If the crime is a strict liability crime, that would be all that is required. If the crime required proof of any form of *mens rea*, that would have to be proved in respect of each convicted person.⁹⁹ This simple scheme of liability assumes that the jurisdiction adopting it has inchoate offences of conspiracy, assisting crimes and encouraging crimes.

What is "outcome responsibility"? The phrase is Honoré's, and what he had in mind was unmediated causal responsibility for an outcome. 100 If, unlike him, you are persuaded that D's prior or current intervention, even if non-deceptive or non-coercive, may be a more than *de minimis* cause of P's voluntary conduct, D will have outcome responsibility for a wrong more immediately caused by P if, but for D's intervention, the wrong would not have occurred, or would have occurred in materially different circumstances.

Is outcome responsibility confined to causal responsibility for the outcome? In the legislative proposal set out in the previous section stipulating conditions for the expansion of principals in addition to perpetrators, provision was made for agreements between D and P that P should commit a crime. If D and P form a joint criminal project, they share responsibility for the commission of the crime and its associated harms. An analogy can be made with an unlimited commercial partnership where all partners will share profits

⁹⁹ This offers an escape from the enduring problems of formulating appropriate forms of mens rea for accomplices. In terms of the conduct element of offences, that element will be satisfied if D has outcome responsibility (a matter for legal stipulation) for the instantiation of the external elements of the offence and, in terms of any fault element, the question becomes whether, when D incurred outcome responsibility through his acts or omissions, he did so with the fault element required for the offence. Some technical adjustments in the expression of mens rea may be necessary where the mens rea for the relevant offence attaches to some direct physical action which D did not perform. The English and Welsh Law Commission's idea that D will possess mens rea for the offence if he would have the requisite mens rea were he to do the deed himself rather than prevail on P to perform the deed is useful: see n.96, ante. Difficulties in dispensing with forms of mens rea customised for nonperpetrators may arise where D's conduct suffices for outcome responsibility in respect of a wrong directly perpetrated by P, but D is unaware of salient details of P's intended or completed wrong. For instance, D, a gangland boss, may order P to do "whatever is necessary" to make V pay for the drugs supplied by the organisation, aware that P will choose from a grisly menu of options but be astute not to concern himself with the details. Adapting the principle laid down in DPP for Northern Ireland v. Maxwell [1978] 1 W.L.R. 1350 (House of Lords), D should be considered a principal in any offence that P commits, provided it is an offence of a type that D contemplated that P might commit. For circumstances where P's offence fell beyond anything that D contemplated, there should be liability under an appropriately drafted offence of assisting and encouraging crime. 100 See n.46.

and losses.¹⁰¹ In *Gnango*, as previously discussed, a majority of the Supreme Court found that D and P had agreed to a hostile exchange of gunfire in a public place, an agreement that for Lords Phillips, Judge and Wilson formed the basis for a finding that D was P's accomplice in the shot that killed V notwithstanding that the target of the shot was D. Lord Clarke and Lord Brown went a different route:

"...the victim was shot and killed in the course of the respondent carrying out the agreement between the two men as principals to shoot and be shot at, just as in a duel." "I am not disposed to analyse the defendant's liability for murder in accessory terms but as a principal to a joint enterprise" 103

Using this rationale to restore the murder conviction on the facts of the case was highly problematic. There was scant if any evidence of an agreement to shoot and be shot at and even if there was such an agreement it was an agreement to resolve by arrangement a mutual antagonism by using fatal force. This did not bring the parties into concert except as to the time and place for their gunfight. Furthermore, enlargement of the class of principals to include non-perpetrators probably requires legislation or at the very least some doctrinal heavy lifting notably absent from the judgments. 105

From first principles, however, where parties to an agreement are true collaborators in crime, it makes perfect sense to regard them as joint principals to the crimes carried out pursuant to the agreement. So, if D and P have agreed to burgle V's home it would be appropriate to treat them as joint principals in the offence: it would not matter if there was uncertainty about who was the lookout and who broke in. Less welcome perhaps is the fact that under the liability scheme under discussion, as principals they would require full mens rea for any offence charged. Any offence collateral to the burglary such as the murder of V would require proof against each

Where that condition is satisfied, it can be justifiably asserted that anything that P does in pursuance of the project and which is something that D contemplates that he might do, is assignable to D.

¹⁰² Gnango (n.6), [76] (Lord Clarke).

¹⁰³ *ibid.*, [81] (Lord Clarke) His Lordship expressly agreed with Lord Brown's similar conclusions at [69]-[71].

This was accepted by Cooke J. and the Court of Appeal, see n.52 and associated text. The decision of the Supreme Court of Canada in *Sokoloski v. R.* [1977] 2 S.C.R. 523 is instructive on this point. D, the purchaser of drugs, did not become a party to P's drug trafficking by agreeing the time and place to purchase drugs from him. Buyers and sellers have to co-ordinate their activities but they are on different sides of the fence.

¹⁰⁵ Lord Brown and Lord Clarke do not refer to Lord Bingham's firm assertion, with Glanville Williams, that principals must be perpetrators (n.26), nor to any authority helpful to their position (see n.106, *post*).

man of an intent to kill or cause serious harm. Below it will be argued that this is a virtue. Regarding D as a party to the agreement as a joint principal with the perpetrator, P, re-engages with the older tradition that parties to a conspiracy are joint principals in any offence carried out pursuant to the agreement, a tradition that could be usefully revived if complicity were to be abolished.¹⁰⁶

Do encouragement and assistance by D without more generate outcome responsibility on his part for any crime committed by P within the terms of D's encouragement? In certain circumstances this may be the case. For instance, P's commitment to a crime may be flagging but then reinvigorated by a pep talk from D. Or P may be daunted by the difficulty of his contemplated crime but then greatly assisted by advice from P on the best modus operandi. If encouragement or assistance has a sufficient salience in the history of the wrong, and was provided with intent to assist and encourage, then a finding that D was a causal agent in P's offence is likely. But tokens of encouragement and assistance that do not pass that threshold should be excluded. As Dressler has so clearly demonstrated, assistance and encouragement have been extensively The tendency to embrace within the sphere of interpreted.¹⁰⁷ complicity tokens of assistance or encouragement which have no impact on the commission of the wrong appears to be endemic in Anglophone systems in criminal law. This expansionary approach to the conduct element of complicity is compounded by lowering the culpability standard to include knowledge or even recklessness that

^{106 &}quot;It is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of the common intent is, in law, done by all. The act, however, must be in pursuance of the common intent." Macklin (1838) 2 Lew.C.C. 225, (Alderson B.). This theory was employed by Hobhouse L.J. in Stewart and Schofield [1995] 1 Cr.App.R. 441, 447, where he distinguished parties to a joint enterprise from "mere aider[s] and abettor[s] etc." stating: "In contrast where the allegation is joint enterprise, the allegation is that one defendant participated in the criminal act of another." Similar ideas can be found in Mcauliffe v. The Queen [1995] HCA 37, (1995) 183 C.L.R. 108; Gillard v. The Queen [2003] HCA 64, (2003) 219 C.L.R. 1; and Clayton v. R. [2006] HCA 58, (2006) 81 A.L.J.R. 439. Hobhouse L.J.'s idea, that one can participate in a crime as a principal without being a perpetrator through a joint enterprise which includes the perpetrator, is based on agency. That, with respect, seems correct, provided a finding of agency is based on something more than foresight on D's part that if he agrees crime A with P, the commission of crime A may lead to P committing crime B. What is frequently overlooked by those favouring findings that D is a principal to P's criminal act by way of agency or authorisation is that D, as a principal, must have full mens rea with respect to all offences he is charged with, thereby limiting liability for offences collateral to offences agreed between D and P. So if the collateral offence is murder, D would have to foresee as a virtual certainty that on committing crime A, P would go on to commit murder.

¹⁰⁷ "Reforming Complicity Law" (n.11); "Reassessing the Theoretical Underpinnings of Accomplice Liability" (n.20).

one may assist or encourage as a sufficient alternative to a direct intention to assist or encourage. As a consequence persons such as taxi drivers, providers of otherwise lawful services, and family members with no criminal disposition whatever may find themselves embroiled in the crimes of others and held fully responsible for the offence.

The best way forward would be to dispense with assistance and encouragement *per se* in the liability scheme put forward here. That is not to say that non-causal assistance or encouragement should go unpunished. In England and Wales, we have to hand a new inchoate crime of assisting and encouraging crime, intending to or foreseeing that one might assist or encourage crime.¹⁰⁸

To summarise: all forms of liability for the commission of substantive offences would be direct liability. In terms of conduct, there would have to be outcome responsibility for the criminal wrong at issue. That would be present if D's conduct has more than a *de minimis* causal impact on the commission of the wrong, or if he has agreed with others that the wrong be committed, and intends that the crime should be carried out pursuant to the agreement. Liability for the offence would follow if D has the culpability, if any, that the offence requires. ¹⁰⁹ Assistance and encouragement to commit crimes lacking any causal impact would be penalised under the inchoate offence of encouraging and assisting crime.

If this reform agenda were ever to be fulfilled one major basis for criminal liability would be absent, namely liability for offences committed collaterally to a joint enterprise. In particular, murder convictions would only be obtainable on proof that the defendant had a direct or oblique intention to kill or cause serious bodily harm. If the public satisfaction arising from the two murder convictions finally obtained with respect to the killing of Stephen Lawrence is recalled, surely any proposal to dispense with this route to a murder conviction based on foresight of the risk of serious violence is doomed.

That may well be the case. But as a matter of principle murder verdicts should only be available against persons who intend to kill or cause serious harm. It is not appropriate that mandatory life sentences are imposed on persons who lack that high form of

¹⁰⁸ See n.32, ante.

¹⁰⁹ If no *mens rea* is required, all principals will be on the same footing. In *Hobbs v. Winchester Corp.* [1910] 2 KB 471, P was liable for the strict offence of selling food unfit for human consumption. D, a vetinary surgeon had negligently certified that the meat was safe. As the non-selling accomplice, it was ruled in his favour that liability on his part required knowledge that the meat was unsafe. Under our proposal, each would be liable, as P would not have sold the meat but for D's certification. Of course, the outcome may still be criticised on the basis of a disapproval of strict liability.

culpability. That said, the fact that D agrees with P to commit crime A, aware that P may go on to commit crime B, a more serious offences of violence associated with the commission of crime A, deepens his culpability for crime A. It is obviously a more serious matter to become involved in crimes aware that this may lead their associates to commit more serious crimes than to enter criminal associations that do not give rise to that possibility.

To a large extent it is possible to reflect this enhanced culpability in terms of liability and sentence. Currently, if D is aware that his involvement with P in crime A is capable of encouraging P to commit the more serious offence of crime B, under the *Serious Crime Act* 2007, D can be punished up to the maximum provided for crime B. ¹¹⁰ It should be further provided that involvement on the part of D with P in crime A with foresight that on committing crime A, P may go forward to commit crime B, should of itself expose D to the possibility of receiving the maximum penalty for crime B. So for the Stephen Lawrence kind of case, murder verdicts would not be available on the basis of mere foresight that a criminal associate might inflict serious violence. However, as Stephen was clearly murdered by someone, life sentences might well be passed on persons proved to be in a criminal association with the murderer at the time and place of the victim's death.

For many persons the absence of a murder verdict in cases of this kind will fall short of vindicating the memory of the victim and stand in the way of eventual peace of mind for the victim's family and friends. The strength of these emotions can clearly affect the judicial process. But, as the Supreme Court's decision in *Gnango*¹¹¹ exemplifies, there is a danger of constructing rather than finding liability for this most serious offence.

V. CONCLUSION

During the time that a criminal code was in prospect at some time for England and Wales, ¹¹² one of the good things anticipated was the simplification and reduction of those parts of judge made law that made for uncertainty and complexity. ¹¹³ The first proposals for

¹¹⁰ Serious Crime Act 2007, ss.45 and 58.

^{111 (}n.6.)

¹¹² In 2010 the Law Commission announced in its annual report that it would no longer work towards producing a comprehensive criminal code.

¹¹³ The reduction of complexity and uncertainty with the avoidance of the inevitable, numerous appeals is certainly possible in some areas of law. The general fraud offence created by s.1 of the Fraud Act 2006 attracted many critics. But whatever its substantive merits or demerits it replaced many separate offences of deception that gave rise to a considerable volume of litigation and, to date, despite thousands

reforming the law of complicity by the English Law Commission were more radical than anything advocated here.¹¹⁴ Complicity was to go, including joint enterprise, without any enlargement of the class of principals. It was to be replaced by spare and elegant inchoate offences of encouraging and assisting offences. Inchoate offences of encouraging and assisting crime did eventually reach the statute book but as a supplement to complicity and in a more dense and convoluted form than when first proposed. There has been a further Law Commission report on complicity and joint enterprise, but it was in large part a recommendation to incorporate the current common law of complicity and joint enterprise into statutory form.¹¹⁵ There are no governmental plans to change any part of this picture.¹¹⁶

In the last two decades, true or direct complicity has become ever more expansive, and parasitic accessory liability has grown like knotweed. If the whole field of conduct associated with, but not constituting, principal offending is surveyed (including conspiracy), there is a vast amalgam of statutory and common law, with overlaps, uncertainties and occasional contradictions. Little wonder that the boundaries of complicity are frequently tested by appeals on points of law. In England and Wales, change is not forthcoming, but change there should be.

of prosecutions for the offence, there have been no reported appeals on points of interpretation.

¹¹⁴ Law Commission for England and Wales, *Assisting and Encouraging Crime* (Law Com. C.P. no. 131, TSO 1993).

¹¹⁵ See Law Commission, *Participating in Crime* (n.14).

¹¹⁶ See n.12.

"NATIONAL VALUES ON LAW AND ORDER" AND THE DISCRETION TO EXCLUDE WRONGFULLY OBTAINED EVIDENCE

Ho Hock Lai

ABSTRACT

In Singapore, recent decisions, beginning with the case of Phyllis Tan, have held that there is no general judicial discretion to exclude evidence on the ground that it was wrongfully obtained. This article scrutinises the soundness of this ruling and explores the criminal justice philosophy that might have influenced the courts in taking this position. It is argued that the evidence code that applies in Singapore does not bar the recognition of such discretion, and that the approach taken in the earlier case of Cheng Swee Tiang, under which improperly obtained evidence may be excluded on a discretionary basis, is to be preferred.

I. INTRODUCTION

Law enforcement officers sometimes employ wrongful means to obtain evidence. The wrong may take the form of an illegal act or an act that, although not illegal, is unfair or otherwise improper. In Singapore, the judiciary have recently changed their position on the discretion to exclude such evidence. Although the common law discretion to exclude illegally obtained evidence was previously recognised, recent decisions have rejected it as being inconsistent with the code of evidence – the Evidence Act (hereafter "the EA") – which applies in Singapore. The recent developments are described and placed in historical context, and the relevant cases and legislation analysed, in Part II.² Part III offers broad and somewhat speculative reflections on the criminal justice philosophy that influenced the shift in the law and the political values underpinning it. These reflections are related to the theme of the conference at which a version of this paper was presented:3 is there an Asian identity to law? It is difficult to see how the answer can be other than negative, given the great

[·] Professor, Faculty of Law, National University of Singapore. I am grateful to Paul Roberts for his valuable comments on a draft of this article and the anonymous referees for their helpful suggestions.

¹ Cap. 97, rev. edn 1997 (original enactment: Ordinance 3 of 1893).

² See also Jeffrey Pinsler, "Whether a Singapore Court has a Discretion to Exclude Evidence Admissible in Criminal Proceedings" (2010) 22 Singapore Academy of Law Journal 335. See also Tan Yock Lin, "Sing a Song of *Sang*, a Pocketful of Woes?" [1992] Singapore Journal of Legal Studies 365.

³ 9th Asian Law Institute Annual Conference 2012, "Law: An Asian Identity?", National University of Singapore, May 31 to June 1, 2012.

diversity of legal systems and traditions in Asian countries.⁴ But that is not the claim that is defended in this article. Instead, the general observation will be made that, on the chosen topic and more generally in the field of criminal evidence and procedure, there are reasons to be critical of invocations of Asian or national values in defending the balance that is struck between competing interests. These broad reflections are apposite because, as Lord Scarman noted in *R. v. Sang*,⁵ the topic raises "problems that lie at the root of the criminal justice of a free society."

II. DEVELOPMENTS IN THE LAW ON THE DISCRETION

A. "National values on law and order"

In December, 2007, in Law Society of Singapore v. Tan Guat Neo Phyllis⁶ (henceforth "Phyllis Tan"), the Singapore High Court declined to follow the approaches to wrongfully obtained evidence taken in a number of Western liberal democracies, namely, England, Australia and Canada. It was held that, unlike the law in those jurisdictions, the law in Singapore does not give judges a general discretion to exclude relevant evidence on the ground of its wrongful provenance. The court read the EA in a manner that left no room for such Chan C.J. delivered the judgment of the threea discretion. judge bench. In remarks that prefaced the discussion of the foreign approaches, the Chief Justice emphasised that "the objectives and values of [the Singapore] criminal justice system", her "social environment" and her "national values on law and order" were different from those that prevailed in the countries just named.⁷

B. The law before Phyllis Tan

This decision marked a turn in the law. Before December, 2007, it was accepted that courts in Singapore had a discretion to exclude wrongfully obtained evidence. In the 1964 case of *Cheng Swee Tiang v. P.P.*,8 the accused was charged with assisting in the carrying out of a public

⁴ Even if, as Ruskola suggests, there is a classical Chinese legal tradition that may be loosely identified as "East Asian" and that historically spanned across China, Japan, Korea and Vietnam, that tradition has long lost its cultural hegemony. The present legal systems of those countries are based on civil law, socialist law, and, in the case of Hong Kong, the common law. "Although the classical East Asian tradition was far from unitary, the contemporary political and ideological fragmentation seems even great and the commonalities even fewer": Teemu Ruskola, "The East Asian Legal Tradition" in Mauro Bussani and Ugo Mattei (eds), The Cambridge Companion to Comparative Law (Cambridge University Press 2012), 276.

⁵ [1980] A.C. 402, 450 (House of Lords).

^{6 [2007]} SGHC 207, [2008] 2 S.L.R.(R.) 239.

⁷ *ibid.*, [58].

⁸ [1964] M.L.J. 291 (Court of three Judges).

lottery. At trial, the prosecution relied on evidence that had been procured unlawfully.⁹ The accused was convicted on the basis of this evidence. He appealed against his conviction. The Attorney-General, to his credit, decided not to resist the appeal. However, since full arguments had been made on "a point of law on the discretionary exclusion of evidence illegally obtained", ¹⁰ the court decided to rule on the issue. There was a split among the judges. The majority took the following position:

"It is undisputed law ... that while evidence unlawfully obtained is admissible if relevant, there is a judicial discretion to disallow such evidence, if its reception would operate unfairly against an accused."

This discretion was to be exercised on a case-by-case basis. In doing so, the trial judge had to be mindful of the following competing interests:

"On the one hand there is the interest of the individual to be protected from illegal invasions of his liberties by the authorities and on the other hand the interest of the state to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground." ¹²

The majority relied on the common law. In particular, they referred to the cases of *Kuruma v. R.*¹³ (a decision of the Privy Council sitting in London hearing an appeal from Kenya) and *Callis v. Gunn*¹⁴ (a judgment of the English High Court's Queen's Bench Division).¹⁵ *Dicta* in those cases supported a judicial discretion to exclude unfairly obtained evidence, as where it was gained by "a trick"¹⁶ or by

⁹ The unlawful act was presumably the abetment of the crime which occurred when the undercover police officer made a test purchase of the lottery.

¹⁰ Cheng Swee Tiang (n.8), 292.

¹¹ *ibid.* This principle was approved by the Court of Appeal in *Chan Chi Pun v. P.* [1994] SGCA 36, [1994] 1 S.L.R.(R.) 654, [12].

¹² Cheng Swee Tiang (n.8), 293. In Phyllis Tan, (n.6), [99], the court observed an "uncanny resemblance" between this statement and a passage in the judgment of Barwick C.J. in R. v. Ireland [1970] HCA 21, (1970) 126 C.L.R. 321, 335. But the majority judges in Cheng Swee Tiang could not have been inspired by Ireland since the former decision predated the latter. It is quite clear from the near identity of the words used that the quotation above was based instead on a passage in Lawrie v. Muir [1950] S.L.T. 37, 39 (High Court of Justiciary). This Scottish authority was not cited in Cheng Swee Tiang.

¹³ [1955] A.C. 197 (Privy Council).

¹⁴ [1964] 1 Q.B. 495.

¹⁵ Other relevant cases include *Jeffrey v. Black* [1978] Q.B. 490, 498; R. v. Payne [1963] 1 W.L.R. 637 (Court of Criminal Appeal); and *King v. R.* [1969] 1 A.C. 304 (Privy Council).

¹⁶ Kuruma (n.13), 204.

"oppressive" means or "by false representations, ... by threats, by bribes, anything of that sort". In following these foreign judgments, none of the judges in *Cheng Swee Tiang* saw any need to consider whether the "social environment," the criminal justice "objectives" and "national values on law and order" in Kenya and England were any different from those in Singapore.

In 1979, the scope of the common law discretion was curtailed by the House of Lords in R. v. Sang. 18 All of the law lords agreed on this answer to the certified question that was placed before them:

"(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means." 19

Despite the unanimous endorsement of this answer, there were important differences in the individual judgments.²⁰ Glossing over those differences, the general effect of *Sang* was to confine within limits the reach of the discretion to exclude evidence "on the ground that it was obtained by improper or unfair means". As can be gathered from limb (2) above, this discretion was available only for two categories of evidence. The first was "admissions and confessions": for example, a confession taken in breach of the Judges' Rules, when they were still in force, could be excluded at the court's discretion.²¹

¹⁷ Callis v. Gunn (n.14), 502.

¹⁸ (n.5.)

¹⁹ *ibid.*, 437.

²⁰ As one commentator put it, "no single ratio clearly emerged from the case": Sybil Sharpe, *Judicial Discretion and Criminal Investigation* (Sweet & Maxwell, 1998), 52. The judgment of Lord Diplock had the most impact on later cases: Peter Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Clarendon Press, 1997), 118, 119. Amongst the judges, he and Viscount Dilhorne gave the discretion the narrowest scope. The latter judge disagreed with the dicta found in earlier cases insofar as they suggested a wide discretion (*e.g. Callis v. Gunn* (n.14)), and he took the view that some of the earlier cases, such as *R. v. Payne* (n.15), 637 and *Jeffrey v. Black* (n.15), were wrongly decided: *R. v. Sang* (n.5), 440-441. Lord Scarman, on the other hand, explicitly declined to reject the earlier dicta: *ibid.*, 456.

²¹ The Judges' Rules were guidelines for police officers on interviewing suspects. They were first drawn up by English judges in 1912 at the request of the Home Secretary: *R. v. Voisin* [1918] 1 K.B. 531 (Court of Criminal Appeal), 539. The Rules underwent several revisions. As the Privy Council explained in *Peart v. R.* [2006] UKPC 5, [2006] 1 W.L.R. 970, [1], "Although classed formally as administrative directions ..., they were afforded over time a higher status, and a general requirement became established that police officers had to observe them if confessions received were to be admitted in evidence. They have been replaced in England and Wales by

The second was "evidence obtained from the accused after commission of the offence".²² For example, if a blood sample was extracted from the accused by oppression, the judge has the discretion to prevent the prosecution from proving that the sample contained traces of the prohibited drug.²³ Outside of these two categories, impropriety in obtaining evidence is not a ground for its exclusion. So, if the police were to enter illegally and steal evidence from the premises of a third party,24 this would not in itself give rise to a discretion to exclude it: limb (2) would not be engaged because the police did not get the evidence "from the accused". Since the evidence must be obtained "after the commission of the crime", limb (2), on the face of it, also does not allow the exclusion of evidence obtained during or before the commission of a crime; hence, according to one commentator, the discretion will not apply to "evidence of an agent provocateur" or to evidence procured "by such means as illegal telephone tapping or bugging".25

In addition to the limited discretion to exclude evidence on the basis that it had been improperly or unfairly obtained, the House of Lords acknowledged in limb (1) above the existence of a separate discretion to exclude evidence that was more prejudicial than probative. In exercising this discretion, the concern is whether the evidence is likely to mislead the court. This has nothing directly to do with the

the provisions of Code C made under the Police and Criminal Evidence Act 1984". In Singapore, Schedule E to the *Criminal Procedure Code* (Cap. 113, 1970 edn) was based on a version of the Judges' Rules. A statement taken in breach of this Schedule could be excluded at the judge's discretion under s.125(1) of the same Act. Schedule E was repealed in 1976.

- ²² Lord Diplock confined this limb to cases where the evidence was "tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect": R. v. Sang (n.5), 436. Other judges took broader views and were content to leave the discretion under limb (2) open-ended: *ibid.*, 445 (Lord Salmon), 450 (Lord Fraser), 456-57 (Lord Scarman). Real and uncontroversial examples are difficult to find, but see n.23, post.
- ²³ Lord Diplock in *Sang (ibid.*, 435) used the principle in limb (2) to explain the decision in *R. v. Payne* (n.15), where the accused, who was charged with drunk driving, was wrongly induced to submit himself to a medical examination, and it was held by the Court of Criminal Appeal that the evidence given by the doctor of his unfitness to drive ought to have been excluded at the trial. Lord Diplock's interpretation of *Payne* was adopted by the Singapore High Court in *Ajmer Singh v. P.*, [1986] SGHC 39, [1985-1986] S.L.R.(R.) 1030, [17].
- ²⁴ For Lord Fraser, the discretion applied not only to cases where the evidence was obtained from the accused, but also to cases where the evidence was obtained from premises occupied by the accused: *R. v. Sang* (n.5), 452.
- ²⁵ Rosemary Pattenden, Judicial Discretion and Criminal Investigation (Clarendon Press, 1990), 266.

manner in which the evidence was obtained before the trial;²⁶ it has to do, instead, with the effect of using the evidence at the trial itself.

Sang has been followed repeatedly by the courts in Singapore.²⁷ It is sometimes cited alongside Cheng Swee Tiang on the (inadequately examined) premise that the two cases are consistent with each other and concurrently applicable.²⁸ Thus, the general understanding was that some judicial discretion existed to exclude wrongfully obtained evidence: if the scope was not as wide as it was left open in Cheng Swee Tiang, it was not narrower than it was acknowledged in Sang.²⁹ Then came Phyllis Tan.³⁰

C. Phyllis Tan

Phyllis Tan was one of a string of cases³¹ arising from a series of sting operations targeted at law firms suspected of touting, specifically, of engaging in the practice of procuring conveyancing work from real estate agents by giving them referral fees. The sting operations were conducted by a private investigation agency hired by a group of solicitors from other firms. The respondent was one of the lawyers who were ensnared. Highly incriminating conversations were secretly recorded by the undercover private investigator. Following the success of the sting operation, the private investigator lodged a complaint with the Law Society. Phyllis Tan was brought before the Disciplinary Committee for unprofessional conduct. After hearing the evidence, which included the secret recordings, the Disciplinary Committee found that the charges against her were made out. The Law Society then applied to the High Court for Phyllis Tan to show cause as to why she should not be disciplined in accordance with the relevant provisions of the Legal Profession Act.32

A number of legal arguments were made by counsel for Phyllis Tan before the High Court. One of them was that the Disciplinary Committee should have excluded the recorded conversations because they had been illegally or unfairly obtained. The court held that the

²⁶ However, the manner in which evidence was obtained may cast doubt on reliability of the evidence, and this in turn may contribute to the conclusion that its probative value is outweighed by its prejudicial effect: see (n.114) *post*.

 ²⁷ e.g. Ajmer Singh v. P. (n.22); P. v. Teo Ai Nee [1995] SGHC 70,
 [1995] 1 S.L.R.(R.) 450; How Poh Sun v. P. [1991] SGCA 22, [1991] 2 S.L.R.(R.) 270;
 Choo Pit Hong Peter v. P. [1995] SGHC 108, [1995] 1 S.L.R.(R.) 834.

²⁸ Ajmer Singh v. P. (n.22), at [18]; P. v. Teo Ai Nee (n.27), [79].

²⁹ Jeffrey Pinsler, *Evidence, Advocacy and the Litigation Process* (2nd edn, LexisNexis Butterworths 2003), ch. 9.

^{30 (}n.6.)

³¹ e.g. Law Society of Singapore v. Bay Puay Joo Lilian [2007] SGHC 208, [2008] 2 S.L.R.(R.) 316; Wong Keng Leong Rayney v. Law Society of Singapore [2007] SGCA 42, [2007] 4 S.L.R.(R.) 377; Law Society of Singapore v. Liew Boon Kwee James [2007] SGHC 209, [2008] 2 S.L.R.(R.) 336.

³² Cap. 161, rev. edn 2009 (original enactment: M Ordinance 57 of 1966).

strict rules of evidence did not apply to hearings by the Disciplinary Committee;³³ furthermore, the private investigator "had not acted illegally or improperly",³⁴ and the respondent was not entrapped.³⁵ While the case could have disposed on those grounds, the court proceeded anyway to state its views on the discretion to exclude illegally obtained evidence in the criminal context.³⁶ Although the discussion was *obiter*, it carried great weight.³⁷ The position taken in *Phyllis Tan* has been followed in later decisions³⁸ and endorsed by the Court of Appeal.³⁹

The Chief Justice referred to foreign authorities, paying especially close attention to the reasoning of the judgments of the Law Lords in R. v. Loosely, 40 and in the Australian High Court case of Ridgeway v. R. 41 This examination of foreign judgments was preceded by the remarks alluded to earlier and which are now set out in full:

"[I]n formulating the principles of law in relation to the legal issues raised in this case, we must give primacy to the *objectives* and values of our criminal justice system. The principles which we lay down must conform to the fabric of our law, including our constitutional structure. Whilst we pay great respect to the decisions of the appellate courts in Australia, Canada and England on these issues, we must also bear in mind that the legal and social environments in these jurisdictions are not the same, and that the courts in each jurisdiction must take into account the values and objectives of the criminal justice system which they wish to promote. The common law is infused with common or universal values which are applicable in all common law jurisdictions, but, in the field of criminal law, national values on law and order may differ not only in type, but also in intensity of adherence."42

Rejecting the approaches taken elsewhere, the Chief Justice declared, without any qualification, that the Singapore criminal court "has no

³³ Phyllis Tan (n.6), [59], following the earlier ruling made in Wong Keng Leong Rayney v. Law Society of Singapore (n. 31).

³⁴ (n.6), [48].

³⁵ *ibid.*, [52].

³⁶ ibid.

³⁷ The case was heard by a strong bench of three judges, one of whom was the Chief Justice, another a Judge of Appeal. In *Wong Keng Leong Rayney v. Law Society of Singapore*, (n.30) the Court of Appeal deferred discussion of the discretion under the EA to the case of *Phyllis Tan* which was then pending appeal.

³⁸ Law Society of Singapore v. Bay Puay Joo Lilian (n.30); Law Society of Singapore v. Liew Boon Kwee James (n.31).

³⁹ Lee Chez Kee v. P. [2008] SGCA 20, [2008] 3 S.L.R.(R.) 447, at [106]; Muhammad bin Kadar v. P. [2011] SGCA 32, [2011] 3 S.L.R. 1205.

⁴⁰ [2001] UKHL 53, [2001] 1 W.L.R. 2060.

⁴¹ [1995] HCA 66, (1995) 184 C.L.R. 19.

⁴² (n.6), [58] (emphasis added).

discretion to exclude illegally obtained evidence".43 Is illegality, however grave, never a ground for exclusion? To test this out, suppose this incident, which has occurred elsewhere, were to happen in Singapore: in order to retrieve the incriminating evidence that the suspect had swallowed, four police officers pinned him down while a doctor administered emetics forcibly to him by injection and by inserting a tube into his stomach through his nose. In Jalloh v. Germany,44 the Grand Chamber of the European Court of Human Rights held that this treatment of the suspect was "inhuman and degrading" and therefore in violation of article 3 of the European Convention of Human Rights. The court also held that the use of the illegally obtained evidence was, in the circumstances, in breach of the right to a fair trial under article 6 of the Convention. If (the literal reading of) the ruling in Phyllis Tan is correct, the Singapore criminal court is powerless to exclude the evidence in the scenario just painted. Infringement of the civil liberty of a citizen, however outrageous, would seemingly not give the judge any discretion to prevent the state from using the evidence against him. It would be unfortunate if the High Court really intended to go this far.⁴⁵

⁴³ *ibid.*, [150]. See also *ibid.*, [126], where the High Court held that *Cheng Swee Tiang* was not "consistent with the *EA* in so far as [it] sanction[s] the exclusion of evidence on the ground of unfairness to the accused". A similar holding can be found *ibid.*, end of [127]. See also *Muhammad bin Kadar v. P.* (n.39), [51], noting that it was observed in *Phyllis Tan*:

[&]quot;that the principle ... that the court had a discretion to exclude evidence only on the ground that it was obtained in ways unfair to the accused was incompatible with the [EA]. That principle was ousted, in particular, by s 2(2) of the EA".

For discussion of this section, see Part D post. On the same point, see also Mohamed Emran bin Mohamed Ali v. P. [2008] SGHC 103, [2008] 4 S.L.R.(R.) 411, [19]:

[&]quot;In *Phyllis Tan* ..., the court of three judges ... held unequivocally that the position in Singapore was that the courts have no discretion under the [EA] to exclude illegally obtained evidence".

As to the position taken by the High Court in *Phyllis Tan* on the discretion to exclude overly prejudicial evidence (under limb 1 of the formulation in *Sang*), see text at nn.76-78, *post.*⁴⁴ [2006] ECHR 721, (2007) 44 E.H.R.R. 32. For a similar case which occurred in the United States, see *Rochin v. California* (1952) 342 U.S. 165 (U.S. Supreme Court). In Singapore, an incident has been reported in which a doctor, acting on the request of the police, retrieved a stolen ring that the suspect had swallowed by inserting an endoscope into his stomach through his nose: Thant Zin, "Got it", *The Straits Times* (Singapore, March 7, 2008), 45.

⁴⁵ The possibility of a different legal recourse was left open. It was suggested that the court has the power to declare the prosecution unconstitutional for infringement of the accused's "constitutional rights to equality before the law and equal protection of the law" where the means used to obtain the evidence was "particularly egregious" and "the Attorney-General condones the unlawful conduct of the law enforcement officers ... by not prosecuting them as well": (n.6), [147]. This constitutional argument – which was made but rejected in *Mohamed Emran bin Mohamed Ali v. P.* (n.43) –

While the police misconduct will often be less serious, falling short of "inhuman or degrading"⁴⁶ treatment of a suspect or of behaviour that "shocks the conscience",⁴⁷ it is always a problem when the executive arm of the state exceed or abuse their power in the investigation of crimes. In all of such cases, the substantive question arises against the rule of law backdrop of the need for an institutional check on executive power: given this need, what sort of response to the problem can we expect of the court, *qua* criminal court?⁴⁸

D. Exclusionary Discretion and the Evidence Act

One might think, from reading the long quotation in the previous section, that the High Court, speaking through the Chief Justice, took an autochthonous path because Singapore's special "social environment" and "national values on law and order" set her apart from Western liberal democracies. One might then have expected the Chief Justice to tell us exactly what those distinctively Singaporean "social environment", "national values" *et cetera* are. However, there is no discussion or explanation along those lines in the judgment.

The court relied on technical legal reasoning. In broad strokes, the argument ran as follows. In Singapore, the law of evidence is as codified in the EA. The EA does not provide for any discretion to exclude illegally obtained evidence. Section 2 of the EA allows judges to draw on the common law but only if the common law is consistent with the EA, ⁴⁹ and the common law discretion to exclude improperly obtained evidence is not. Under the EA, so long as the evidence that is sought to be admitted is "relevant" (a key term in the EA which is commonly treated as synonymous with "admissible"), the court has no power to prevent its admission. Hence, on a literal reading of the court's ruling, criminal judges in Singapore have no residual exclusionary discretion at all.

It was implicit in the decision of the majority judges in *Cheng Swee Tiang* that the EA allowed room for the discretion and this has not been controverted by any court before *Phyllis Tan*. Had judges in all

does not squarely address the accused's grievance; his core objection is not unequal treatment but to the state enforcing the criminal law against him through unlawful means.

⁴⁶ As was found by the Grand Chamber of the European Court of Human Rights to be the case in *Jalloh v. Germany* (n.44).

⁴⁷ Rochin v. California (n.44), 172.

⁴⁸ On theories of the criminal trial, see *e.g.* Ho Hock Lai, "Liberalism and the Criminal Trial" [2010] Singapore Journal of Legal Studies 87, and "The Presumption of Innocence as a Human Right" in Roberts and Hunter (eds), *Criminal Evidence and Human Rights* (Hart 2012), 270-275.

⁴⁹ See generally, Jeffrey Pinsler, "Approaches to the Evidence Act: the Judicial Development of a Code" [2002] 14 Singapore Academy of Law Journal 365.

of the previous cases, save for Ambrose J.⁵⁰ who dissented in *Cheng Swee Tiang*, overlooked the constraints of the EA? We should hesitate to lay this charge, especially against the majority in *Cheng Swee Tiang*. The majority must have been aware that the dissent was based on the argument that the EA precluded the availability of a residual exclusionary discretion. It is unfortunate that they did not explicitly deal that argument but, given how their decision went, it must be that they disagreed with it.

In theory, the availability of a general discretion is defensible as an "unwritten" law supplement to the EA that comports with the Aristotelian insight that no legal code can be exhaustive and that the universal claim of codified rules must, at some point, be read in the light of the particularistic demands of justice.⁵¹ On this view, the recognition of a residual discretion is not inconsistent with the code; on the contrary, justice in the application of a code, in virtue of the fact that we are dealing with a code, requires that it be refined by discretion in exceptional cases.

The reasoning in *Phyllis Tan* is contestable not only as a matter of abstract theory. At the textual level, the position is not as clear as it was made out to be. There is no provision in the $E\mathcal{A}$ that positively or convincingly precludes a general exclusionary discretion.

"[he] expressed the view that the *Kuruma* ... discretion (that illegally obtained evidence was admissible unless its prejudicial effect outweighed its probative value) was a new development. But, at the same time, Ambrose J conceded that the courts in Singapore had the power to exclude evidence which was unfair to the accused".

It is even more puzzling that in the very next paragraph, the High Court took a different reading of Ambrose J.'s dissent, noting that, "while commenting that the *Kuruma* discretion to exclude illegally obtained evidence on grounds of fairness was contrary to the $E\mathcal{A}$," he "nonetheless accepted that the court could exclude evidence which was more prejudicial than probative" (*ibid.*, [125]).

51 On the Aristotelian virtue of equity in law, see generally, Roger A. Shiner, "Aristotle's Theory of Equity" 27 (1994) Loyola of Los Angeles Law Review 1245; Lawrence B. Solum, "Equity and the Rule of Law" in I. Shapiro (ed.), *The Rule of Law:* NOMOS XXXVI (New York University Press 1994) 120; Eric G. Zahnd, "The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law" 59 (1996) Law and Contemporary Problems 263. Jeffrey Pinsler has made an argument to the same effect although not in the same terms. As he puts it: "the nature of the law of evidence demands flexibility which ... can never be offered by fixed rules in a statute notwithstanding the quality of draftsmanship"; the exceptional exercise of an exclusionary discretion "may have particular significance in preventing the injustice which may otherwise result from the technical application of a rigid statutory rule": (n.2), 354.

⁵⁰ It seemed to Ambrose J. that the fairness discretion "referred to in *Kuruma*'s case and *Callis v Gunn* [was] a new development of the common law in England", and he could "not see how the courts in Singapore can recognize such a discretion without express statutory provision": *Cheng Swee Tiang* (n.8), 294. In *Phyllis Tan* (n.6), [124], the High Court seemed to have misread Ambrose J., stating that:

Section 5 of the EA, in brief, provides that only facts declared relevant under the EA "may" be proved;⁵² to put this crudely, relevant evidence is admissible. The EA deals with admissibility of evidence as a matter of law. If the evidence is inadmissible under the EA, the discretion has no application; the court must, not may, exclude the evidence. However, if the evidence is admissible under the EA, then and only then can the discretion become an issue.⁵³ The discretion is consistent with the EA insofar as legal admissibility is conceded rather than denied in its exercise: there is no logical contradiction here. The principle in section 5 that only relevant evidence is admissible does not logically entail that evidence, if relevant, must be admitted.⁵⁴

The same point has to be borne in mind when reading "Explanations 2" to section 258(3) of the Singapore *Criminal Procedure Code 2010*, which was formerly section 29 of the *EA.*⁵⁵ It provides that certain forms of improprieties (such as the use of deception) in obtaining a statement does not render it "inadmissible". Although this provision has drawn criticisms, ⁵⁶ it is uncontroversial if seen as no more than an expression of the common law principle that the use of wrongful means to obtain evidence does not make it inadmissible. Importantly, this still leaves open the question of whether the evidence may nevertheless be excluded in the exercise of judicial discretion. And the answer to that question cannot be found in the statutory provision itself.

The Singapore EA is based on the *Indian Evidence Act* 1872 ("Indian EA"). Relying on a commentary in an Indian treatise on evidence law, the High Court in *Phyllis Tan* concluded that the "Indian position confirm[ed its] understanding of the general scheme

 $^{^{52}}$ "Facts in issue" may also be proved under s.5 of the EA. For present purposes, this category of facts may be ignored.

⁵³ See *e.g. King v. R.* (n.15), 315: "the exercise of discretion is called for in order to decide whether, even though admissible, [the evidence] should be excluded in fairness to the accused".

⁵⁴ In this connection, it may be noted that in *P. v.* Dahalan bin Ladaewa [1995] SGHC 126, [1995] 2 S.L.R.(R.) 124, at [27], (decision upheld by the Court of Appeal, *P. v. Dahalan bin Ladaeva* [1995] SGCA 87, [1996] 1 C.L.A.S. News 75), Rajendran J. drew a distinction between the phrase "shall be admissible" and "shall be admitted". He held that the use of the former phrase in a statutory provision was consistent with the availability of a judicial discretion to exclude evidence that was admissible under that provision. *Cf. Muhammad bin Kadar v. P.* (n.39), [46]-[56].

⁵⁵ Act 15 of 2010. *Cf. Phyllis Tan* (n.6), [127].

⁵⁶ See the parliamentary debate on this provision during the second reading of the *Criminal Procedure Code Bill* on May 18 and 19, 2010: (2010) 87 *Parliamentary Debates Singapore Official Report*, cols 416-7, 429-430, 443, 456-457; 461-464, 549-550, 553-556; also available at http://bit.ly/SingaporeParlReps accessed November 20, 2012. See also "ACLS and the CPC Bill" (2010) 6(1) Pro Bono 9 (containing criticisms of the provision by Mr Subhas Anandan, a prominent defence lawyer).

of the admissibility of evidence under the EA".57 The High Court could also have cited (but it did not cite) the Ninety-Fourth Report of the Law Commission of India issued in 1983.58 Commission's reading of the Indian EA, "there is no residuary power in the court to reject ... evidence, however gross may be the illegality perpetrated in collecting it".59 This was found to be highly unsatisfactory, and reform to the law was advocated. Commission – perhaps out of the desire to make more compelling their recommendation - seemed to have overstated the defect they As they noted, there is in fact a 1973 were seeking to rectify. decision of the Indian Supreme Court which "is sometimes regarded as recognising a discretion in the courts in India to exclude evidence obtained illegally".60 But the Law Commission found this authority to be inconclusive. They recommended the introduction of a section into the Indian EA that would confer an exclusionary discretion in explicit terms.61

The recommended provision was never enacted. Indian law on the present topic is unclear and judicial authorities are not always consistent. What can be said is that the Indian Supreme Court has, in a number of cases, acknowledged that judges have the discretion to exclude illegally obtained evidence even though the Indian EA is silent on the matter. An especially strong endorsement can be found

⁵⁷ (n.6), [128], citing Sarkar's Law of Evidence (16th edn, Wadhwa & Co. 2007), vol. 1, 121.

⁵⁸ Law Commission of India, Evidence Obtained Illegally or Improperly: Proposed Section 166A, Indian Evidence Act, 1872 (L.C.I. no. 94, 1983).

⁵⁹ *ibid.*, 36. Similarly, in two general reviews of the Indian Evidence Act 1872, the Law Commission of India asserted that "in India, the Judge has no discretion to exclude evidence if it is relevant and admissible and not excluded by any specific provision of law": *The Indian Evidence Act, 1872* (L.C.I. no. 69, 1977), [76.6], and repeated in *Review of the Indian Evidence Act, 1872* (L.C.I. no. 185, 2003), 433. This assertion was made in a comment on s.136 of the Indian *EA* (which is equivalent to s.138 of the Singapore *EA*). It was not supported by any argument, and neither of the reports cited any Indian authority.

^{60 (}n.58), 7. The case is R. M. Malkani v. State of Maharashtra [1972] INSC 232, [1973] A.I.R. 57. Referring to Kuruma v. R. (n.13), the Indian Supreme Court noted "that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence". The Law Commission found this case inconclusive on the availability of the discretion. But they added that if this decision "is to be construed as indicating that the courts in India have such a discretion, then [the Law Commission's] recommendation to incorporate such a discretion in ... statute law should be welcome": Law Commission of India (1983) (n.58), 7.

⁶¹ See Law Commission of India (1983) (n.58), 37 for the text of the draft provision. The proposed discretion allowed the court "to exclude evidence obtained illegally or improperly if, in the circumstances of the case, the admission of such evidence would bring the administration of justice into disrepute": *ibid.*, 35.

in *State of Punjab v. Baldev Singh*.⁶² Sitting as a court of five judges on a special reference by a three-Judge bench, the Indian Supreme Court affirmed the existence of the discretion and founded it on these general principles and policies:

"Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused. ... Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused. If after careful consideration of the material on the record it is found by the court that the admission of evidence collected in [an illegal] search... would render the trial unfair then that evidence must be excluded... 63

"In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice."

In Malaysia, the evidence legislation⁶⁵ is also based on the Indian *EA*. The Malaysian judiciary has similarly reserved for itself the discretion to exclude wrongfully obtained evidence. In *Goi Ching Ang v. P.P.*,⁶⁶ the Federal Court, sitting as a five-judge bench, made an equally strong pronouncement on the need for this power:

⁶² [1999] INSC 224, (1999) 6 S.C.C. 172. See also: Madhya Pradesh v. Paltan Mallah [2005] INSC 51, (2005) 3 S.C.C. 169, [28], [31], [32]; Khet Singh v. Union of India [2002] INSC 154, (2002) 4 S.C.C. 380, [13], [16]. Cf. Pooran Mal v. The Director of Inspection (Investigation), New Delhi [1973] INSC 243, (1974) 1 S.C.C. 345, [25]; State v. NMT Joy Immaculate [2004] INSC 367, (2004) 5 S.C.C. 729, [15].

⁶³ Punjab v. Baldev Singh (n.62), [44].

⁶⁴ *ibid.*, [56].

⁶⁵ Evidence Act 1950.

^{66 [1999] 1} M.L.J. 507, 527, relying on, *inter alia*, the *dictum* in *Kuruma v. R.* (n.13). This discretion was exercised to exclude a statement which was admissible under the *Evidence Act* 1950, s.27. (The Singapore *EA* previously had a same provision but it has been deleted and now appears as s.258(6)(c) of the *Criminal Procedure Code* 2010.) This discretionary power has its source in the common law. The common law is applicable in West Malaysia under the *Civil Law Act* 1956, s.3(1)(a), provided that no "other provision has been ... made by any written law in force in Malaysia". According to the Malaysian Federal Court, nothing in the *Malaysian Evidence Act* 1956 has taken away this discretionary power: *Goi Ching Ang, ibid.*, 525. *Goi Ching Ang* has been followed in a number of cases, *e.g. Francis Antonysamy v. P.* [2005] MYFC 9,

"Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission."

It is worth observing that the passages just quoted were written by Asian judges sitting in Asian courts. They spoke in the face of an Evidence statute that is similar to the EA that applies in Singapore. And they upheld principles and values that are about as "liberal" as can be found in any "Western" judgments.

The High Court in *Phyllis Tan* relied on section 138(1) of the *EA* in support of its ruling.⁶⁷ It is true that section 138(1) does state, in the relevant part, that "the court *shall* admit the evidence if it thinks that the fact, if proved, would be relevant". But four points must be noted.

First, section 138 is in the portion of the EA that deals with "Examination of Witnesses" which in turn is located in Part III on "Production and Effect of Evidence". This provision merely addresses the procedure on how issues of relevancy are to be raised, addressed and proved at the trial. It is difficult to believe that the provision would be tucked away in such a remote corner of the EA if it was meant to have the drastic effect of eliminating all exclusionary discretion.⁶⁸

Secondly, even a mandatorily worded provision may be qualified by judicial discretion. A good, albeit historical example, is the former

^{[2005] 3} M.L.J 389; P. v. Mohd Farid bin Mohd Sukis [2002] 3 M.L.J. 401 (High Court of Malaya); these two cases in turn were cited in Hanafi bin Mat Hassan v. P. [2006] MYCA 42, [2006] 4 M.L.J 134, [69]-[74]. In the highly publicised sodomy trial of Anwar Ibrahim, the Malaysian High Court excluded certain DNA samples on the finding that the police had obtained them by wrongful means. ("3 items 'Inadmissible as Evidence", New Straits Times (Singapore, March 9, 2011).)

About two weeks later, the same court reversed its own decision on the ground that new evidence showed that the samples were obtained lawfully. ("Court Rules 3 Items can be Admitted as Evidence", New Straits Times (Singapore, March 24, 2011).)

⁶⁷ (n.6), [124], citing commentary on this provision in *Halsbury's Laws of Singapore* (Butterworths Asia 2000), vol. 10, [120.009].

⁶⁸ See also Pinsler (n.2), 358.

section 1(f)(ii) Criminal Evidence Act 1898 of England and Wales. Prior to the repeal of this provision, the position was as follows. Should the shield against cross-examination on the accused's bad character be lifted under this section, he "shall ... be required to answer ... any question" that he cannot otherwise be asked or be required to answer under that section.⁶⁹ As Lord Fraser noted in Sang,⁷⁰ this "statute does not in terms confer a discretion". Yet, the cases have "clearly established" that "a judge has a discretion to exclude evidence of the previous record or character of the accused and to refuse to allow him to be cross-examined as to his character notwithstanding that such evidence or cross-examination may be legally admissible under s 1(f)(ii)".71 Indeed, as Professor Tapper has pointed out, "[i]t was just because the conditions were unqualified in s 1(f)(ii) that the discretion was developed".72 It may similarly be argued in Singapore that the use of the mandatory term "shall" in section 138 does not prevent the court from assuming (to borrow the words of Lord Fraser) "an underlying discretionary power" as part of its inherent power to ensure a fair trial.⁷³

Thirdly, a provision identical to section 138(1) of the EA can be found in the evidence legislation of India and Malaysia.⁷⁴ Notwithstanding this, and as we just saw, there are authorities in those jurisdictions which support a residual discretion to exclude wrongfully obtained evidence.

Fourthly, resting the argument against the discretion on section 138(1) has far-reaching consequences. As it is construed in *Phyllis Tan*, the effect of the provision is that once the court finds the evidence to be relevant, it must admit it. There is no discretion to exclude evidence that is relevant. A consistent application of this construal of the provision would force the court to surrender not

⁶⁹ Unless the shield is lifted, the accused "shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character".

⁷⁰ (n.5), 447.

⁷¹ Lord Fraser reasoned that "[i]f there were not some underlying discretionary power it would be difficult to explain how the judges were able, when the [Act] came into force, to exclude legally admissible evidence": *ibid*.

⁷² Colin Tapper (ed.), Cross and Tapper on Evidence (9th edn, Butterworths 1999), 181.

⁷³ (n.71). Limb (1) of the discretion formulated in Sang was grounded by the law lords in the imperative of ensuring a fair trial and, at least for Lord Salmon, Lord Fraser and Lord Scarman, the same was true of limb (2). For an argument that the exclusionary discretion to exclude unduly prejudicial evidence lies within the court's inherent jurisdiction, see Pinsler, (n.2), cited in Muhammad bin Kadar v. P. (n.39), [52]; the same view was taken by the Minister for Law in a speech delivered in Parliament on February 14, 2012, during the second reading of the Evidence (Amendment) Bill: http://bit.ly/SingaporeParlReps accessed November 20, 2012.

⁷⁴ Indian *EA*, s.136(1); Malaysian *Evidence Act* 1950, s.136(1).

only the discretion to exclude evidence on the ground of its wrongful procurement but all other types of discretion to exclude relevant evidence – including, for example, "the discretion founded at common law to exclude accomplice evidence if there was an obvious and powerful inducement for him to ingratiate himself with the Prosecution"⁷⁵ (the objection here is not one of irrelevancy) and, more importantly, the general discretion to exclude overly prejudicial evidence.

A few years after *Phyllis Tan* was decided, the Court of Appeal revisited the topic in Mohammad bin Kadar v. P.P.⁷⁶ The Court of Appeal affirmed the applicability of limb (1) of the answer given in Sang; it held that the discretion to exclude "evidence that had more prejudicial effect than probative value" was consistent with the EAand therefore applicable in Singapore. According to the Court of Appeal, this much was in fact accepted in *Phyllis Tan.*⁷⁷ If it was in fact so accepted, it was by no means clearly accepted.⁷⁸ Leaving this aside, a difficulty arises. Either section 138(1) has the effect attributed to it in Phyllis Tan or it has not. If it has the effect attributed to it in Phyllis Tan, the court must admit the evidence so long as it is relevant; it should matter not that the evidence, although relevant, is at the same time unduly prejudicial. There is no express provision in the EA that gives the judge the general discretion to exclude relevant evidence which is overly prejudicial. Yet, this did not prevent the Court of Appeal in Mohammad bin Kadar, or, as we are told, the High Court in Phyllis Tan, from assuming such an exclusionary power. If the reception of this common law discretion to exclude prejudicial evidence is not barred by section 138(1) and is consistent with the EA, why should it be any different for the common law discretion to exclude illegally obtained evidence?

context."

⁷⁵ See Lee Chez Kee (n.39), [106], citing Roy S. Selvarajah v. P. [1998] SGHC 272, [1998] 3 S.L.R.(R.) 119, [59], and adding: "I do not propose to comment fully on the validity of any such discretion, save to say that the court of three judges has recently in ... Phyllis Tan ... persuasively ruled that apart from the confines of the EA, there is no residual discretion to exclude evidence which is otherwise rendered legally relevant by the EA."

⁷⁶ (n.39.)

⁷⁷ *ibid.*, [51]. See also Pinsler, (n.2), [19]-[20].

What the High Court did say in *Phyllis Tan* (n.6), [126], was that: "the fairness exception has no practical effect in the case of entrapment evidence since, by definition, the probative value of such evidence must be greater than its prejudicial value in proving the guilt of the accused... For this reason, the *Sang* formulation is, in practical terms, consistent with the *EA* and in accordance with the letter and spirit of s 2(2), and is therefore applicable in the Singapore

Curiously, one form of exclusionary discretion seemed to have been endorsed in *Phyllis Tan* itself. The court apparently accepted, during its discussion of *P.P. v. Knight Glenn Jeyasingam*, ⁷⁹ that there was judicial discretion to exclude evidence of a representation made in plea bargaining. This discretion was founded on "a long-established practice or convention ... that such representations were made 'without prejudice' and that the [Public Prosecutor] will not seek to admit them in evidence against the accused should the representations be rejected". ⁸⁰ If breach of a mere convention can be the basis of an exclusionary discretion, even though it is not explicitly provided for in the EA, it is strange that illegality, the breach of a law – which is after all a higher norm – cannot be. ⁸¹

To bring the discussion in this Part to an end, three conclusions may be drawn. Firstly, it is at least debatable whether the framework of the EA, or any provision in it, prevents the recognition of a residual discretion to exclude evidence on the ground of its wrongful provenance. Secondly, the courts have accepted that the EA does not prevent them from assuming and exercising certain types of exclusionary discretion; in particular, the Court of Appeal has affirmed the availability of a general discretion to reject evidence which, although relevant, is unduly prejudicial. Thirdly, *Phyllis Tan* rendered unavailable one type of discretion: the court has no power to exclude evidence merely on the basis that it has been illegally gathered. However, going back to the first point, it is possible to read the EA in a manner that supports the contrary view.

III. BROAD REFLECTIONS

A. Underlying criminal justice philosophy

If, as just argued, there is room in the EA for interpretive manoeuvre, why did the High Court take the interpretation which it did in *Phyllis Tan*? What broader considerations might have underpinned its decision? Some speculations will be offered.

⁷⁹ P. v. Knight Glenn Jeyasingam [1999] SGHC 91, [1999] 1 S.L.R.(R.) 1165. In Phyllis Tan, it was apparently accepted that the court in Knight Glenn Jeyasingam was right to have prevented the prosecution from relying on the representation (see (n.6), end of [181]); where it found the court to have erred was in providing "a legal basis for its ruling rather than rely on the convention" (*ibid.*, [182]).

⁸⁰ (n.6), [118].

 $^{^{81}}$ I thank Paul Roberts for perceptively pointing out a difference. In disallowing reliance on the "without prejudice" representation, the court is directly enforcing the norm against disclosure and preventing its violation, whereas in the case of illegally obtained evidence, the wrong has already been done. While this difference may have normative significance, the crucial fact is that the court acknowledged the existence of an exclusionary power outside the confines of the $E\mathcal{A}$.

In 1964, when the majority judges in *Cheng Swee Tiang* acknowledged the discretion to exclude illegally obtained evidence, they had in clear view the social interest – the collective interest of the citizenry – in protecting "the individual ... from illegal invasions of his liberties by the authorities". In contrast, the judgment in *Phyllis Tan* made no mention of civil liberties.⁸² The emphasis was on "convicting and punishing the guilty", the belief being that the law should not place undue obstacles in the path of securing conviction of the factually guilty.⁸³ Obviously, it would be wrong to claim that due process values did not matter to the court in *Phyllis Tan*.⁸⁴ What is in contention, however, is the balancing or prioritizing of different criminal justice values and interests.

Those who have been following the Chief Justice's thinking on the subject will not be surprised by the present development. His outlook on criminal justice may be gleaned from his judgments, articles and speeches. (It should be clarified straightaway that the statements that will be referred to were not directed specifically at illegally obtained evidence. It should also be remembered that the judgment delivered by the Chief Justice in *Phyllis Tan* was not his personal judgment but the judgment of the three-judge bench.)

In 1996, before he became the Chief Justice and when he was the Attorney-General, Mr Chan defended the "Singapore model" of the "criminal process" in a published public lecture.⁸⁵ In it, he remarked:

"Each country must have a criminal justice system which meets its own needs. Most Singaporeans, I believe,

⁸² There is however mention of the "public interest in ensuring that the administration of justice is not brought into disrepute by the courts overlooking egregious illegal conduct on the part of the law enforcement officers": (n.6), [44].

⁸³ In a speech given while he was the Attorney-General, Mr Chan observed that "Singapore ceased to give maximum due process to accused persons from 1976 and has progressively favoured the crime control model": Chan Sek Keong, "Rethinking the Criminal Justice System of the Singapore for the 21st Century" in *The Singapore Conference: Leading the Law and Lawyers into the New Millenium @ 2020* (Butterworths Asia 2000), 42.

As the Chief Justice acknowledged soon upon taking office: "The Judiciary must always give priority to upholding the fundamental values of the legal system, such as due process or procedural fairness": Chan Sek Keong, "Welcome Reference for the Chief Justice – Response" (April 22, 2006) http://bit.ly/SG-CJWelcome-Response accessed November 20, 2012. In remarks made at a lunch gathering of judges, prosecutors and defence lawyers, the Chief Justice stressed that all sides "have a vital stake in the fairness and integrity of our criminal justice system": Chan Sek Keong, "Tripartite Forum: Bench-Prosecution-Bar – Brief Remarks of the Chief Justice", Singapore Law Gazette (Singapore, December 27, 2010).

⁸⁵ Chan Sek Keong, "The Criminal Process – The Singapore Model" (1996) 17 Singapore Law Review 433.

appreciate the safe environment they live in and support a criminal justice system that is responsible for it...⁸⁶

"What that balance should be, between community needs and individual rights in the criminal process, is determined by the ideological and social goals of the government of the day. If anything has been made clear in Singapore, it is that crime control has always been and is a high priority on the Government's action agenda." ⁸⁷

In his address before the "International Conference on Criminal Justice under Stress: Transnational Perspectives" held in New Delhi, India, on November 24, 2006,88 the Chief Justice said:

"The basic values, principles and objectives of our criminal justice system have largely been shaped by Mr Lee [Kuan Yew]'s beliefs. Today, Singapore has a high degree of social and political stability, a modern economy and an effective criminal justice system with low crime rates...⁸⁹

"Singapore has a relatively safe and secure environment that is free from crime because our leaders had the political will to enact an appropriate legal framework to achieve it."90

On 27 October 2009, the Chief Justice gave the keynote address at the New York State Bar Association Seasonal Meeting held in Singapore. He recounted a speech that he had heard as a law student by the then Prime Minister Lee Kuan Yew defending detention without trial and the abolition of the jury system. Ye Mr Lee's primary message, as paraphrased by the Chief Justice, was that:

"English law and English legal institutions are fine for England but not necessarily for Singapore because the political, social and cultural conditions are not the same. Adapt them for our needs, as blindly applied, they could be our undoing... If you study the Singapore statute book

⁸⁶ ibid., 434.

⁸⁷ *ibid.*, 438.

⁸⁸ The speech is unpublished but available at http://pyxis.smu.edu.sg/subjects/CrimeControlSpeechIndia(Final)24Nov06(4).pdf accessed November 2012).

⁸⁹ *ibid.*, [12]. In a separate speech, Mr Chan, then holding the office of Attorney-General, posits this connection between the national economy and criminal law enforcement: "the effectiveness of the criminal justice system in maintaining law and order has become an important factor in attracting new investments to Singapore": (n.83), 32. ⁹⁰ (n.88), [13].

⁹¹ The text can be obtained from the website of the Supreme Court: http://bit.ly/NYSBA-SG-09-Keynote accessed November 20, 2012.

⁹² Mr Lee's speech, given in 1962, can be found at http://bit.ly/SG-PM-1962-law-speech accessed November 20, 2012 (from Google cache).

today, you will find [Minister Mentor] Lee's precepts and values reflected in all the laws." 93

We get a glimpse of those "precepts and values" of Mr Lee from his 1990 address to the Singapore Academy of Law on the occasion of his appointment as the first honorary fellow. He told his audience:94

"The basic difference in our approach [to criminal justice] springs from our traditional Asian value system which places the interests of the community over and above that of the individual.

"In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with customs and values of Singapore society.

"In criminal law legislation, our priority is the security and well-being of law-abiding citizens rather than the rights of the criminal to be protected from incriminating evidence."

B. Critique

This section reflects on the claims made in the quotations above, and the assumptions on which they rest, both generally and in the context of wrongfully obtained evidence. The controversial "Asian values" idiom has gone out of fashion. In *Phyllis Tan*, the Chief Justice wisely refrained from speaking of "Asian values". He spoke instead of "national values on law and order". It is undoubtedly true that Singaporeans value law and order. But so do everyone else, both in the East and in the West, in the North and in the South, including all of the foreign jurisdictions examined in *Phyllis Tan*. We can be certain that the Chief Justice was not implying that the peoples of England, Australia and Canada do not care about law and order. His point presumably was that, compared to these "Western" societies, "we" in Singapore accord greater importance to law and order than to due process and civil liberties.⁹⁵

^{93 (}n.91), [5]. See also Chan, (n.83), 30:

[&]quot;Mr Lee's vision of how Singapore should be governed in the context of law and order has shaped the criminal justice system, its basic values, principles and objectives. For this reason, our criminal justice system can be said to be truly autochthonous."

^{94 &}quot;Address by the Prime Minister, Mr Lee Kuan Yew" [1990] 2 Singapore Academy of Law Journal 155.

⁹⁵ But it should also be noted that it is not in Asia alone that there are (or have existed) criminal justice systems that allow (or have allowed) interests in "law and order" to prevail over the rights of accused persons. Introduction of the exclusionary rule in Germany, Russia and Taiwan was driven by political movement towards greater transparency and accountability in government: Margaret K Lewis, "Controlling Abuse to Maintain Control: The Exclusionary Rule in China" (2011) 43 Journal of International Law and Politics 629, Pt II.

If "we" refers to the government, the statement is generally true so far as it goes. It is true as a description. But the government is not the nation. The values of the nation cannot be equated with the values the government imposes via its laws. In Singapore, support for the balance the criminal law has struck between our interests in law and order and our interests in due process and civil liberties is not as widespread as it is sometimes suggested. Strong dissent is evident in views expressed by Professor Michael Hor% and Mr Michael Hwang (a respected former president of the Singapore Law Society),97 in parliamentary debates on criminal justice issues, 98 on the pages of the newsletters of the Singapore Association of Criminal Lawyers, in the writing of the late Mr K. S. Rajah and others.⁹⁹ In the public lecture that has already been referred to, the Chief Justice himself noted, and went on to argue against, a growing disquiet in some quarters about criminal evidence and procedure having become too "pro-prosecution".100

The balancing that is to be done in the administration of criminal justice is all too frequently formulated in terms of a tension between the interests of the community and the rights of individuals. This is unhelpful. Surely society as a whole has an interest in the state adhering to due process and respecting the rights of fellow citizens who are under investigation.¹⁰¹ Conversely, interest in the

⁹⁶ e.g., Michael Hor, "Change, Contestation and Conservatism in the Court of Appeal" in Yeo Tiong Min, Hans Tjio, Tang Hang Wu (eds), Developments in Singapore Law between 2006 and 2010: Trends and Perspectives (Singapore Academy of Law 2011), 161-62, engaging the Court of Appeal in Tan Kiam Peng v. P. [2007] SGCA 38, [2008] 1 S.L.R.(R.) 1, especially [75], on the legitimacy of reversing the burden of proof through the use of legal presumption (see also P. v. Tan Kiam Peng [2006] SGHC 207, [2007] 1 S.L.R.(R.) 522, [16]).

⁹⁷ See, e.g., the speech he gave at the opening of the Legal Year 2008, reproduced in *Singapore Law Gazette* (February 2008), 1-2: "What [is] disillusioning for our criminal practitioners is the perception that the basic structure of criminal procedure is unnecessarily weighted in favour of the prosecution, and does not give adequate consideration to the rights of the defendants."

⁹⁸ e.g. (n.56).

⁹⁹ e.g. K. S. Rajah, "The Constitutional Right of Access to Counsel" Singapore Law Gazette (August 2002), 31.

^{100 (}n.85), 437: The Attorney-General, as he then was, noted the worry in some quarters that "our criminal process [was] ... tilted against the accused, and that its underlying common law traditions and values [were] being uprooted slowly but surely in favour of a model which [accepted] a high risk of the innocent accused being charged and convicted". However, he believed "that the concerns of the criminal bar and of the law teachers [were] exaggerated". In a separate speech, he attributed the general unhappiness of the criminal Bar with "some aspects of the system" to the fact that the "criminal justice system [was] seen by criminal lawyers as leaving little room for the factually guilty to squeeze through to escape conviction": Chan, (n.83), 36.

¹⁰¹ As Mr Subhas Anandan, president of the Association of Criminal Lawyers, put it, "in protecting the rights of the community Parliament should not forget that

apprehension and conviction of criminals is held by individual members of the community. It is just as misleading, if not worse, to depict the situation as a contest between the interests of law-abiding citizens and the interests of criminals. A rational law-abiding citizen does not believe that she alone should abide by the law; she believes that generally others should as well, including (indeed especially) law enforcement officers when wielding their considerable liberty-infringing powers. Law-abiding citizens would surely want the law to be correctly applied; therefore, they would want innocent persons to be protected from wrongful conviction, and this gives them a reason to believe in due process. It is distorting to frame the problem as one of "community needs versus individual rights" and wrong to suppose that an easy resolution is dictated by any official version of the "national" or "shared value" of "community over self". 102

It is better to examine the problem substantively by identifying the matters that (ought to) concern all as members of a political community. For the majority in Cheng Swee Tiang, it matters that citizens are "protected from illegal invasions of ... liberties by the authorities". It also matters that "evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the courts on any merely technical ground". It clearer and truer to state the competing interests in this way, as principles that bear at once community and individual dimensions. The proper accommodation or balancing of the competing considerations is a normative question with which the polity ought to engage in free and equal discussion; it should not be left to be "determined by the ideological and social goals of the government of the day". 103 Some commentators in Singapore see signs of a more consultative approach being taken in the reform of criminal evidence and procedure, and of steps being taken towards leveling the playing field in criminal trials. 104

the rights of the accused are also a concern of the community": "ACLS and the CPC Bill", (n.56), 10.

¹⁰² See Singapore Government, Shared Values (White Paper, Cmd. 1 of 1991); Jon S.T. Quah (ed.), In Search of Singapore's National Values (Institute of Policy Studies, Times Academic Press 1990); and, for a highly critical perspective, see Neil A. Englehart, "Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore" (2000) 22 Human Rights Quarterly 548, 561-563

¹⁰³ Chan, "The Criminal Process" (n.85); full quote at n.87.

¹⁰⁴ See Melanie Chng, "Modernising the Criminal Justice Framework – The Criminal Procedure Code 2010" (2011) 23 Singapore Academy of Law Journal 23. The Singapore Association of Criminal Lawyers has welcomed the recent introduction of the criminal case disclosure procedure in the *Criminal Procedure Code* 2010, and expressed the hope that it "may herald a new dawn in criminal prosecutions in Singapore": (2010) 6(1) Pro Bono 1.

The approach taken by the majority judges in *Cheng Swee Tiang* to wrongfully obtained evidence has much to commend it. They could have evaded, but did not evade, the difficulty of accommodating or balancing competing principles by taking either of two extreme positions: it is as unwise to exclude evidence peremptorily once it is established to have been obtained by illegal means as it is never to exclude evidence however odious the misconduct in procuring it. While the law is clear and easy to apply if placed on either footing, clarity and predictability are not all there is to justice. The majority judges preferred a particularistic approach, one that strikes the balance in each case as it comes along, taking full account of the context. The fear of this resulting in an arbitrary or capricious exercise of discretion is unfounded;¹⁰⁵ as the High Court in *Phyllis Tan* itself noted, "Courts are used to evaluating competing interests all the time". 106 As to how the discretion should be exercised, there is much experience in other countries that Singapore judges can draw upon. 107

A rich source of experience is accessible in the comparative literature. The discretion to exclude illegally obtained evidence has been justified by courts and academics in other jurisdictions on different reasoning. Exclusion has been defended, for instance, on the ground that the evidence may be unreliable; that it deters similar illegal conduct by law enforcement officers in the future; that it vindicates the suspect's right to certain standards of treatment by the state and is the proper remedy for the breach of that right; that it prevents the administration of justice from falling into disrepute; and that it is demanded by the need to preserve judicial integrity.¹⁰⁸

In Singapore, there was a tentative gesture towards the integrity principle only a few years before *Phyllis Tan* was decided. In *Wong Keng Leong Rayney v. Law Society of Singapore*, ¹⁰⁹ V.K. Rajah J. (as he

¹⁰⁵ That has not been the experience in New Zealand which recently moved to a multi-factorial balancing approach: Scott Optican, "The U.S. Exclusionary Rules: Lessons from New Zealand" [2011] J.C.C.L. 226, 248.

^{106 (}n.6), [46].

¹⁰⁷ Factors considered relevant to the exercise of the discretion can be found in academic literature (for comparative discussion, see *e.g.* Ben Emerson, Andrew Ashworth, Alison Macdonald (eds), *Human Rights and Criminal Justice* (3rd edn, Sweet and Maxwell 2011), 641-644; Meng Heong Yeo, "The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches" (1981) 13 Melbourne University Law Review 31, 46-52; Optican, (n.105)); in judicial decisions (*e.g.* R. v. Shaheed [2002] 2 N.Z.L.R. 377 (New Zealand Court of Appeal) and R. v. Williams [2007] NZCA 52, [2007] 3 N.Z.L.R. 207, both cases discussed in Optican, (n.105)); and legislative provisions (*e.g.* Australian Evidence Act 1995, s.138(3), New Zealand Evidence Act 2006, s. 30(3)).

For an overview of the enormous body of relevant literature, see Paul Roberts,
 Adrian Zuckerman (eds), Criminal Evidence (2nd edn, O.U.P. 2010), 179-91;
 Peter Mirfield, Silence, Confessions and Improperly Obtained Evidence (O.U.P. 1997), 6-33.
 [2006] SGHC 179, [2006] 4 S.L.R. 934.

then was) showed receptiveness to a general exclusionary discretion in these words:¹¹⁰

"[A]ssuming I were unfettered by any authority, I would be persuaded that there will be particularly egregious instances of misconduct where the courts should reject evidence that has been procured in a manner that might be inimically repellent to the integrity of the administration of justice."

Unfortunately, the hope held out by this obiter dictum did not survive Phyllis Tan. In the later case of Lee Chez Kee v. P.P., 111 Rajah J.A. found himself persuaded by the ruling in Phyllis Tan "that apart from the confines of the EA, there is no residual discretion to exclude evidence which is otherwise rendered legally relevant under the EA". And in Muhammad bin Kadar v. P.P., 112 the same judge, speaking for the Court of Appeal, held that there was no judicial power to exclude evidence "based only on facts indicating unfairness in the way [it] was obtained";113 hence, the serious failure of the investigating officer in that case to follow the prescribed procedure for taking a statement from the suspect did not of itself or directly provide a ground for its exclusion.¹¹⁴ However, the Court of Appeal held that procedural non-compliance could cast doubt on the reliability of the statement, and where this was so, the statement might be excluded if the prejudicial effect of admitting the evidence outweighed its probative value. Under this approach, illegality may only be of indirect relevance to the exercise of the exclusionary discretion: it is relevant only where it undermines sufficiently the probative value of the evidence. While this is better than nothing, or the best to be had for the moment, and while the result is sometimes as good as having a "fairness" discretion, it does not go far enough. Highly probative evidence can be obtained by "particularly egregious ... misconduct", and when that happens, the discretion of the form exercised in Muhammad bin Kadar is toothless.

 $^{^{110}}$ *ibid.*, [64]. The High Court in *Phyllis Tan* (n.6), [148], distanced itself from this remark of Rajah J. by observing that his "view was expressed without the benefit of hearing arguments about the effect of the $E\mathcal{A}$ and the separation of powers".

¹¹¹ (n.39), [106].

¹¹² *ibid*.

¹¹³ *ibid.*, [68].

¹¹⁴ In some earlier cases, statements taken by police officers were excluded by the court in the exercise of judicial discretion, and the exclusion appeared to have been grounded directly on findings of serious procedural irregularities on the part of the investigating officers: e.g. P. v. Dahalan bin Ladaewa, (n.54), [77]-[86]; Kong Weng Chong v. P. [1993] SGCA 81, [1993] 3 S.L.R.(R.) 453, [27]-[28]; see also other cases cited in Muhammad bin Kadar v. P. (n.39), [54]. However, the exclusion in these cases were subsequently explained by the Court of Appeal in Muhammad bin Kadar (n.39), [53], as having rested on the different ground that the evidence was more prejudicial than probative.

IV. CONCLUSION

Singapore courts have recently disavowed the discretion to exclude evidence on the ground of its wrongful provenance. It is said that the EA precludes judicial recognition of this discretion. conclusion and the reasoning on which it rests are contestable. The EA does not positively and clearly prevent the court from assuming an exclusionary discretion. In fact, this much is accepted by the judiciary in Singapore insofar as it has vested itself with the power to exclude relevant evidence which is overly prejudicial. If the lack of express mandate in the EA does not prevent the court from taking on this discretion, neither should it prevent judges from recognising the discretion to exclude wrongfully obtained evidence. In most parts of the common law world, courts have assumed some power to prevent the prosecution from relying on such evidence. In denying itself of the same, the Singapore judiciary is taking a somewhat exceptional stance. Larger considerations seem to be at play, considerations that accord priority to maintaining law and order and that attribute decisive weight to the interest in convicting the factually guilty. Somewhere along the way, the countervailing "interest of the individual to be protected from illegal invasions of his liberties by the authorities" has lost the currency it once had. The balance of competing considerations was more wisely struck in Cheng Swee Tiang than in Phyllis Tan.

LISTENING AND HEARINGS: INTERCEPT EVIDENCE IN THE COURTROOM

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ABSTRACT

This article examines the United Kingdom's prohibition on the use of intercepted evidence in court proceedings. It does so in light of the Australian experience with using such evidence in terrorism trials. The different approaches taken in the United Kingdom and Australia to intercepted evidence have led to a significant difference in the strategies used to pre-empt terrorism. In large part, Australia has relied upon a variety of preparatory criminal offences, whilst the United Kingdom has relied upon civil executive orders, such as indefinite detention of noncitizens, control orders and, most recently, terrorism prevention and investigation measures. The article argues that the grounds relied upon in the United Kingdom for prohibiting intercept evidence are not borne out by the Australian experience. Further, the United Kingdom could reduce its controversial reliance upon civil executive orders and move back to a traditional criminal law approach by allowing the use of intercept evidence in terrorism trials.

I. INTRODUCTION

The common thread in post-9/11 anti-terrorism laws is an emphasis on pre-emption.¹ Almost 3,000 people died in the 9/11 terrorist attacks; 202 in the October 2002 Bali attacks; 191 in the March 2004 Madrid attacks; and 52 in the July 2005 London attacks. With these fatalities in mind, many jurisdictions have seen a shift over the last decade from the traditional reactionary approach of the criminal law towards the pre-emption of terrorism before it actually occurs. Government agents are empowered to intervene in the activities of terrorist organisations and individuals engaging in preparatory activities well before the commission of a terrorist attack. A logical

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¹ The pre-emptive focus of anti-terrorism laws has been examined in the Australian and UK contexts. See Tamara Tulich, "A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law" (2012) 21(1) Griffith Law Review 209; Lucia Zedner, "Fixing the Future? The Pre-emptive Turn in Criminal Justice", in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law (Hart Publishing 2009), 35-58; Lucia Zedner, Security (Routledge 2009), 72-87.

consequence of this shift in approach has been to increase the significance of, and need for, intelligence-gathering. The interception of telecommunications is one of the key tools used by law enforcement and intelligence agencies to gather information about potential terrorist activities at a very early stage in their planning.

This article will examine the United Kingdom ("UK") and Australian approaches to the interception of telecommunications. For the purposes of this article, "intercept" means the listening to, or recording of, communications, whether sounds, text or images, as they pass over a telecommunications system. The UK and Australia each allow for the covert interception of telecommunications for the purpose of intelligence-gathering. This obviously raises issues about the circumstances in which material may be intercepted, the categories of material that may be intercepted, the need to respond to technological developments and the appropriate level of judicial and other forms of oversight. However, much of the recent debate in the UK has focused upon a different aspect of the telecommunications interception regime - that is, the use to which intercepted material may be put. The UK and Australia have starkly different approaches to the use of intercepted material. Australia permits the use of telecommunications intercepts as evidence in court proceedings. The UK, on the other hand, is alone in the common law world in generally prohibiting the use of intercept evidence.

The problem with recent debates in the UK about whether to alter the *status quo* – to bring its approach to telecommunications interception into line with the rest of the common law world – is that they have largely been conducted in the abstract. This article seeks to remedy this deficiency by considering what light the Australian experience in the anti-terrorism context might shed on the issues involved. To date, Australian authorities have charged 38 people with terrorism offences. Twenty-five of these have been convicted.² The Australian experience therefore provides us with an insight into the real, rather than imagined, advantages and disadvantages of using intercept evidence in court proceedings.

This article will commence with an overview of the UK (Part II) and Australian (Part III) statutory regimes for the interception of telecommunications. It will concentrate, in particular, upon the extent to which material obtained through this method may be used as evidence in court proceedings.

The principal argument made against the use of intercept evidence in the UK is that it would not have any positive impact upon

² For a detailed overview of Australia's terrorism prosecutions, see Nicola McGarrity, "Testing' Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia" (2010) 34(2) Criminal Law Journal 92.

terrorism prosecutions in the courts. In other words, the use of intercept evidence would not increase the number of convictions in the UK for terrorism offences. Part IV will consider whether the Australian experience bears out this argument. It will examine what role (if any) intercept evidence has played in the conviction of people for terrorism offences in Australia.

Even if the use of intercept evidence in court proceedings would increase the number of convictions for terrorism offences, this is not a complete answer to UK concerns about altering the *status quo*. The question whether to permit intercept evidence in a certain category of case is a balancing act. Any advantages of using intercept evidence must be balanced against the disadvantages. The UK has pointed to a number of such perceived disadvantages and these – as well as whether they are borne out by the Australian experience – will be examined in Part V. These disadvantages are: impact on intelligence-gathering; impact on law enforcement investigations; financial burden of collating and transcribing intercept material; inaccessibility of intercept material; increasing the length of terrorism trials; inability to keep pace with technological change; consistency with human rights (in particular, the right to a fair trial); and overuse of interception warrants.

II. UK STATUTORY REGIME

A. The pre-1985 regime

An unwritten power to intercept communications has been recognised in the UK for over 200 years.³ In 1951, the Secretary of State laid down guidelines as to the circumstances in which he or she would issue warrants. These guidelines stressed the exceptional nature of interception. For a warrant to be issued to the police in cases of serious crime, the police had to demonstrate that normal methods of investigation either had failed or were unlikely to succeed.⁴ Two additional criteria had also to be satisfied for a warrant to be issued in cases involving a threat to national security. Firstly, there "must be a major subversive or espionage activity that is likely to injure the national interest". Secondly, the "material likely to be obtained by interception must be of direct use in compiling the information that is necessary to the Security Service in carrying out

Privy Council, Report of the Committee of Privy Councillors appointed to inquire into the interception of communications (Cmnd 283, 1957), 5. The origin of this power is unknown.
4 ibid., 17, 18.

the tasks laid upon it by the state".⁵ Intercepts could only be used as evidence in court proceedings "in the most exceptional cases".⁶

B. The Interception of Communications Act 1985 (UK)

In Malone v. United Kingdom,7 the European Court of Human Rights found that the interception of telecommunications without a statutory foundation violated the individual's right to respect for The UK Parliament therefore enacted the private and family life. Interception of Communications Act 1985 (UK) ("the 1985 Act"). purpose of the 1985 Act was "to provide a clear statutory framework within which the interception of communications on public systems will be authorised and controlled in a manner commanding public confidence".8 In essence, the 1985 Act codified the previous unwritten law with respect to telecommunications interceptions. It made it an offence to intercept communications except as authorised under a warrant issued by the Secretary of State.9 Warrants could be issued in three situations: (a) in the interests of national security; (b) to prevent or detect crime; and (c) to safeguard the economic well-being of the United Kingdom.¹⁰ The traditional rule that intercepted material could not be used as evidence in court proceedings was maintained.¹¹ The only exception was for proceedings before a tribunal empowered to investigate breaches of the warrant regime. 12

C. The Regulation of Investigatory Powers Act 2000 (UK)

The 1985 Act was replaced by the *Regulation of Investigatory Powers* Act 2000 ("RIPA").¹³ RIPA was enacted to take into account the vast changes that occurred in the telecommunications industry in the 1990s, such as the growth of the internet and mobile phone usage.¹⁴ For the most part, RIPA replicated the provisions of the 1985 Act. There was only one area of significant divergence. This related to the use of intercept evidence in court proceedings.

⁵ *ibid.*, 18.

⁶ ibid., 21. In practice, such material was only used for investigatory purposes and not in criminal prosecutions: UK Home Office, The Interception of Communications in Great Britain (Cmnd 7873, 1980), 5.

⁷ [1984] ECHR 10, (1985) 7 E.H.R.R. 14.

⁸ Home Office, The Interception of Communications in the United Kingdom (Cmnd 9438, 1985), 4.

⁹ Interception of Communications Act 1985 (UK), s.1(1).

¹⁰ *ibid.*, s.2(2).

¹¹ *ibid.*, s.9.

¹² *ibid.*, s.9(3).

¹³ Regulation of Investigatory Powers Act 2000 (UK), Sched 5.

¹⁴ Home Office, Interception of Communications in the United Kingdom: A Consultation Paper (Cm. 4368, 1999), 13-15.

RIPA provided for six situations in which intercepted evidence could be admitted in court.¹⁵ The first four might be described as a re-categorisation (rather than an expansion) of the single exception in the 1985 Act.¹⁶ They each concerned matters arising out of the use of the interception regime, such as proceedings for breach of the regime. To conduct such proceedings effectively, it is obviously necessary for a certain amount of intercept evidence to be used. There is no doubt, however, that the final two exceptions significantly expanded the scope for intercept evidence to be used in the UK in the anti-terrorism context.

The first of these exceptions was for proceedings before the Proscribed Organisations Appeal Commission or arising out of such proceedings. The commission was established by the *Terrorism Act* 2000 (UK) to hear appeals against refusals by the Secretary of State to de-list terrorist organisations. The second exception was for any proceedings before the Special Immigration Appeals Commission or arising out of those proceedings. This commission was established by the *Special Immigration Appeals Commission Act* 1997 (UK) to hear appeals in a range of immigration matters. For example, under Part 4 of the *Anti-Terrorism, Crime and Security Act* 2001 (UK), appeals could be brought before it against the indefinite detention of suspected international terrorists. This indefinite detention regime was repealed in 2005. 18

Since 2000, a further four exceptions have been introduced. Each of these, like the final two exceptions in *RIPA*, has been justified by the need to protect national security, and applies only in the antiterrorism context. First, control order proceedings.¹⁹ In 2005, the government introduced a new system of control orders in the *Prevention of Terrorism Act* 2005 (UK). These orders could be issued

¹⁵ Regulation of Investigatory Powers Act 2000 (UK), s.18(1).

¹⁶ Firstly, any proceedings for a relevant offence. A "relevant offence" means an offence listed under s.18(12) of the *Regulation of Investigatory Powers Act* 2000 (UK). Secondly, any civil proceedings under s.11(8). Section 11(8) makes it the duty of a person to give effect to a warrant enforceable by civil proceedings by the Secretary of State. Thirdly, any proceedings before the Tribunal. Fourthly, any proceedings on an appeal or review for which provision is made by an order under s.67(8). Section 67(8) states:

[&]quot;Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

¹⁷ Terrorism Act 2000 (UK), s.5.

Prevention of Terrorism Act 2005 (UK), s.16(2).

¹⁹ *ibid.*, Sched., para. 9(2).

by the Secretary of State with the prior permission of the court.²⁰ They aimed to prevent the subject of the order from participating in terrorism-related activities by placing restrictions (such as a curfew) or obligations (such as reporting to the police at certain times of the day) on him or her.²¹ The control order regime ceased to operate in December 2011.²² Secondly, financial restrictions proceedings under the *Counter-Terrorism Act* 2008 (UK).²³ Thirdly, financial restrictions proceedings under the *Terrorist Asset-Freezing etc. Act* 2010 (UK).²⁴ Finally, terrorism prevention and investigation measures ("TPIMs") proceedings under the *Terrorism Prevention and Investigation Measures Act* 2011 (UK).²⁵ TPIMs replaced the old regime of control orders. However, they have been criticised as being control orders "in all but name".²⁶

The exceptions discussed above represent a significant – albeit piecemeal – expansion of the circumstances in which intercept evidence may be used in civil proceedings. They do not, however, have any impact on the use of intercept evidence in criminal proceedings. The blanket rule remains that intercept evidence may not be used in the prosecution of a person for a terrorism offence. Or, more accurately, *domestic* intercept evidence may not be used. Intercept material collected by foreign agencies may be used as evidence in UK terrorism trials.²⁷ This is not the only anachronism in the UK regime. Another is that evidence collected from eavesdropping "bugs" installed in private vehicles or premises –

²⁰ The Secretary of State was required by s.3(1)(a) of the *Prevention of Terrorism Act* 2005 (UK) to apply to the court for permission to make a control order. However, s.3(1)(b) allowed the Secretary of State to issue a control order in urgent cases without the prior permission of the court, as long as he or she immediately referred the order back to the court: *ibid.*, s.3(1).

²¹ *ibid.*, s.1.

²² The control order regime was subject to an annual sunset clause. This clause was not renewed in 2011.

²³ The financial restrictions proceedings included any proceedings in relation to UN Terrorism Orders, Freezing Orders in Part 2 of ATCS Act and the Terrorist Financing and Money Laundering proceedings contained within Schedule 7 to the Counter-Terrorism Act 2008 (UK): Counter-Terrorism Act 2008 (UK), s.63(1).

²⁴ The financial restrictions proceedings listed in s.28 of the *Terrorist Asset-Freezing etc. Act* 2010 (UK) included the appeal and review proceedings relating to the freezing of funds and economic resources to persons designated under the Act.

²⁵ Terrorism Prevention and Investigation Measures Act 2011 (UK), Sched. 7, para. 4.

²⁶ The only differences between control orders and TPIMs are: (1) TPIMs are based on a "reasonable belief" rather than "reasonable suspicion" standard; (2) the TPIM legislation sets out an exhaustive list of conditions that may be attached to a TPIM; and (3) TPIMs operate for two years and can only be renewed if there is evidence of new terrorism-related activities (whereas control orders operated for one year and could be renewed even without such evidence).

²⁷ Privy Council, Privy Council Review of Intercept as Evidence: Report to the Prime Minister and the Home Secretary (Cm. 7324, 2008), 9.

as opposed to telecommunications interceptions – may be used in court proceedings.²⁸ These anachronisms have prompted claims that the UK regime is internally inconsistent and should not be maintained. This is not, however, the focus of this article. Instead, this article takes each of the UK's arguments against the use of intercept evidence at face value, and considers them in light of the Australian experience. Before we engage in this task, the following section will highlight the main features of the Australian statutory framework as it relates to both the collection and disclosure of intercept material.

III. AUSTRALIAN STATUTORY REGIME

The Telecommunications (Interception and Access) Act 1979 (Cth) ("the TIA Act") regulates the interception of communications in Australia.²⁹ In general, it is an offence to intercept another person's communications.³⁰ However, the TIA Act gives the Australian Security Intelligence Organisation ("ASIO") and law enforcement agencies the power to intercept telecommunications in three circumstances.

A. Warrantless intercepts

An ASIO officer, or an officer of a Commonwealth, state or territory law enforcement agency, may, of their own initiative, intercept communications, if three conditions are met.³¹ First, the nonsuspect party to the communication must consent to the interception. Secondly, there must be reasonable grounds for believing that the suspect party to the communication has: (a) done an act that has resulted or may result in loss of life or the infliction of serious personal injury; (b) threatened to kill or seriously injure another person or cause serious damage to property; or (c) threatened to take his own life or to do an act that may endanger his or her own life or create a serious risk to his or her health or safety. Finally, there must be an urgent need for the interception such that it is not reasonably practicable to apply for a warrant.

²⁸ Lord Lloyd of Berwick Q.C., *Inquiry into Legislation against Terrorism* (Cm. 3420, 1996), 35-36.

²⁹ The relevant definitions are set out in s.5(1) of the *Telecommunications (Interception and Access) Act* 1979 (Cth). A "communication" includes a conversation or a message whether in the form of sound (such as speech or music), data, text, visual images or signals. A "telecommunications system" means any part of a system in Australia for carrying communications by means of guided or unguided electromagnetic energy (but not for carrying communications solely by means of radio-communication).

³⁰ ibid., s.7(1).

³¹ ibid., s.7(4).

B. ASIO warrants regime

Applications by ASIO for a warrant to intercept telecommunications are determined by the Commonwealth Attorney-General. A warrant may be issued where two criteria are met.³² The first criterion relates to the use of the telecommunications service. Prior to 2006, it was necessary for the service to, or to be likely to, be used (a) for purposes prejudicial to security or (b) by a person who is reasonably suspected of engaging in activities prejudicial to security. However, after the enactment of the Telecommunications (Interception) Amendment Act 2006 (Cth),³³ limb (b) was expanded. ASIO was no longer restricted to obtaining warrants in relation to suspects; it was also able to obtain warrants in relation to non-suspects or "B-parties". A warrant may now be issued if the telecommunications service is being, or is likely to be, used as the means by which a person receives or sends a communication from or to another person who is reasonably suspected of being engaged in activities prejudicial to security.34 The second criterion is that the interception is likely to assist ASIO in obtaining intelligence relevant to security.³⁵ For "security reasons", precise figures of the occasions on which ASIO has sought warrants are not made publicly available.³⁶

C. Law enforcement warrants regime

Law enforcement agencies listed in the *TIA Act* (such as the Australian Federal Police ("AFP")), and state agencies declared by regulation, may apply for a warrant to intercept telecommunications.³⁷ The circumstances in which such a warrant may be issued are significantly broader than for ASIO warrants. This is unsurprising,

³² *ibid.*, s.9(1).

Telecommunications (Interception) Amendment Act 2006 (Cth), Sched 2, item 1.

³⁴ Telecommunications (Interception and Access) Act 1979 (Cth), s.9(1)(a)(i) and (ia). A "B-party" warrant may only be issued by the Attorney-General if he or she is satisfied that ASIO has exhausted all other practicable methods of identifying the telecommunications service used by the suspect or the interception of communications used by the suspect would not otherwise be possible: *ibid.*, s.9(3).

³⁵ *ibid.*, s.9(1)(b)

³⁶ Inspector-General of Intelligence and Security, *Annual Report 2009-2010* (2010), 21. The most recent Annual Report of the Inspector-General of Intelligence and Security states: "Each year the office aims to inspect as many warrants and related documents as possible. In 2009-10 this office examined 100% of the security intelligence warrants which were issued to ASIO. ... These inspections are thorough and go beyond simply 'ticking off' each warrant. ... Our inspections of warrant documents in this reporting period found that the quality of the warrant requests and other warrant related documentation which is presented to the Attorney-General was of a consistently high standard": *ibid*.

³⁷ Telecommunications (Interception and Access) Act 1979 (Cth), s.5, definition of "enforcement agency".

given that such warrants must be issued by an eligible judge or, since the mid-1990s,³⁸ a nominated member of the Administrative Appeals Tribunal ("AAT").³⁹

Warrants may be sought in relation to the investigation of "serious offences," such as "an offence constituted by conduct involving an act or acts of terrorism".40 There are two types of warrant that may The first type is a "telecommunications service" be sought. warrant.⁴¹ This authorises the interception of only one service, such as a single telephone number. Usually, this service will be one used, or likely to be used, by a suspect. However, as with the ASIO warrants regime, it was extended to include non-suspects in 2006. The second type of warrant is a "named person" warrant.⁴² This authorises the interception of any telecommunication services or devices that are likely to be used by the person named in the warrant. Before issuing either type of warrant, the issuing authority must consider: the privacy of any person likely to be interfered with; the gravity of the offence; how much the information likely to be obtained would assist the investigation; the availability of alternative methods of investigation; how much the use of the methods would assist the investigation; and how much the use of such methods would prejudice the investigation (whether by reason of delay or for any other reason).43

D. Use of intercept evidence in court proceedings

At first glance, the Australian approach to the use of intercept evidence in court proceedings seems to mirror that of the UK. The general rule is that lawfully intercepted information may not be used as evidence in court proceedings.⁴⁴ The difference between the Australian and UK approaches lies in the scope of the exceptions to this general rule. Section 74 of the *TIA Act* provides that a person may give lawfully intercepted information (other than foreign intelligence information)⁴⁵ in evidence in an "exempt proceeding". The definition of an "exempt proceeding" is broad and includes prosecutions for terrorism offences.⁴⁶ As a consequence of the

³⁸ Telecommunications (Interception) and Listening Device Amendment Act 1997 (Cth), Sched. 1, item 6.

³⁹ Telecommunications (Interception and Access) Act 1979 (Cth), s.39(1).

⁴⁰ ibid., s.5D(1)(d).

⁴¹ *ibid.*, s.46.

⁴² *ibid.*, s.46A.

⁴³ ibid., ss.46(2) and 46A(2).

⁴⁴ ibid., s.63(1)(b).

This is the reverse of the position in the UK (discussed above).

⁴⁶ The definition of an "exempt proceeding" is contained in s.5B of the Telecommunications (Interception and Access) Act 1979 (Cth). See also the definition of a

Telecommunications (Interception and Access) Amendment Act (No. 2) 2010 (Cth), it also includes proceedings under, or relating to a matter arising under, Divisions 104 (control orders) and 105 (preventative detention orders) of the Criminal Code.⁴⁷

IV. THE ROLE OF INTERCEPT EVIDENCE IN TERRORISM PROSECUTIONS

In 2007, the UK Interception of Communications Commissioner, Sir Swinton Thomas, stated that the "perceived advantage" of using intercept evidence in court proceedings is outweighed by its negative effects for intelligence agencies, law enforcement agencies and the trial process.⁴⁸ The commissioner did not explain what was meant by "perceived advantage". However, it is likely that he was referring to the potential for intercept evidence to increase the number of convictions for terrorism offences. The main argument made by those in the UK who seek to maintain the status quo is that intercept evidence would secure only a modest increase in the conviction rate for general criminal offences; in the anti-terrorism context, intercept evidence would not increase the conviction rate at all.49 argument is premised upon an assumption that intercept material is of relatively minor significance to the investigation of terrorism For example, the then UK Secretary of State, Charles Clarke, stated that the "intelligence and surveillance and the data we

[&]quot;prescribed offence" in s.5 (offences punishable by imprisonment for a maximum period of at least three years). Information gathered by way of telecommunications intercepts may be used as evidence against individuals other than the suspect under surveillance. Williams and Hume note that: "[u]nder the TLA Act, the collected information can be used to initiate investigations or prosecutions against people entirely unrelated to the original suspect using information that under other laws would be protected from such use. The non-suspect and other innocent parties run a real risk of being the subject of criminal investigation merely because they happened to talk to someone who was a suspect (or talked to someone who talked to a suspect)": David Hume, George Williams, "Who's Listening? Intercepting the Telephone Calls, Emails and SMS's of Innocent People" (2006) 31(4) Alternative Law Journal 211, 212-213.

⁴⁷ Telecommunications (Interception and Access) Act 1979 (Cth), subss 5B(bb) and (bc).

⁴⁸ Interception of Communications Commissioner, Report of the Interception of Communications Commissioner for 2005-2006 (2007), 11.

⁴⁹ Charles Clarke, Written Ministerial Statement 26 January 2005: Interception of Communications, HC Deb, January 26, 2005, vol. 430, cols 18-19WS; Oral Evidence of Charles Clarke, in Joint Committee on Human Rights, Prevention of Terrorism Bill (2004-05, HL 68, HC 334), Ev. 8; Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention (2005-06, HL 240, HC 1576), 58; Lord Carlile of Berriew Q.C., Operation Pathway: Report Following Review (2009), 16; Lord Carlile of Berriew Q.C., Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (2010), 25.

get from that, particularly in relation to terrorism, relies often on individuals and agents, more so than intercept".⁵⁰

The Australian experience in prosecuting suspected terrorists strongly contradicts this assumption. In each of Australia's terrorism trials, intercept evidence has played a critical role. The use of intercepts in the 2008 trial of Benbrika and eleven other men before the Victorian Supreme Court is a good example. In this case, the prosecution "relied to a large degree on 481 conversations which were covertly, but lawfully, recorded by use of telephone intercepts and listening devices".⁵¹ In summarising the prosecution's closing address, Bongiorno J. stated:

"Apart from putting an argument as to the importance of the evidence of the former co-accused, Izzydeen Atik, and of SIO39, an undercover police officer, and referring briefly to some of the other largely uncontested evidence, the prosecutor relied almost entirely on the electronically intercepted statements of the various accused. Most of these statements were made by the accused in the presence of other accused, including Atik, and SIO39, but some of them were made to other persons who were not alleged to be part of the terrorist organisation which is central to the Crown case on most of the counts on the indictment." ⁵²

There are two primary reasons why intercept evidence plays such an important role in the prosecution of terrorism offences. The first relates to the definition of a terrorist act. One element of the definition is that the action or threat of action be done with the intention of advancing a political, religious or ideological cause.⁵³ Normally, identification of a defendant's motive could only occur as a result of cross-examination of the defendant during trial or confessions made to investigating officials.⁵⁴ However, in many of Australia's terrorism trials, the defendant's desire to pursue violence in the name of Islam was apparent from the intercept evidence presented to the court. For example, the motive of Saney Aweys, one of the defendants in the Operation Neath trial before the Victorian Supreme Court, was evident from comments such as the following: "[s]traight away, after the conviction, one day later fires

⁵⁰ Oral Evidence by Charles Clarke, Prevention of Terrorism Bill (n.49), Ev 8.

⁵¹ Benbrika & Ors v. R. [2010] VSCA 281, [7].

⁵² R. v. Benbrika & Ors (Ruling No 30) [2008] VSC 477, [2].

⁵³ Criminal Code Act 1995 (Cth), s.100.1(1).

⁵⁴ Peters v. R. (1998) 192 C.L.R. 493, 551 (Kirby J.): "absent a comprehensive and reliable confession, it is usually impossible for the prosecution to get into the mind of the accused and to demonstrate exactly what it finds was there at the time of the criminal act".

broke out in the country and all were happy ... we say Allah bring the *fitna* [trouble] ... Allah bring them calamity."55

The second reason why prosecutors have relied so heavily upon intercept evidence relates to the nature of Australia's terrorism offences. As noted in the introduction, the underlying purpose of Australia's anti-terrorism legislation is to pre-empt terrorist attacks. With this aim in mind, the Australian Parliament provided for the proscription of organisations, of created offences for involvement with such an organisation and criminalised activities preparatory to the commission of a terrorist act. This approach represents a significant deviation from the traditional criminal law. In R. v. Lodhi, opposed Spigelman C.J. (with whom McClellan C.J. at C.L. and Sully J. agreed) stated:

"It was ... the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, *e.g.* well before an agreement has been reached for a conspiracy charge." ⁶⁰

This approach is not unique to Australia. Australia's definition of terrorism "largely reproduced" the UK definition.⁶¹ Further, the UK provided for the proscription of organisations and created terrorist organisation offences in 2000.⁶² It also criminalised preparatory acts in 2006.⁶³

The ability to use telecommunications intercepts in criminal proceedings has undoubtedly given Australian law enforcement agencies the ability to arrest people at a much earlier stage. Intercept evidence

 $^{^{55}\,}$ Ian Munro, "Three guilty, two walk free over terror attack plan", The Age (Melbourne, December 24, 2010).

⁵⁶ Criminal Code Act 1995 (Cth), Div. 102. See also Charter of the United Nations Act 1945 (Cth), ss.20-21.

⁵⁷ Criminal Code Act 1995 (Cth), Div. 102.

⁵⁸ Criminal Code Act 1995 (Cth), Div. 101.

⁵⁹ Lodhi v. R. [2006] NSWCCA 121, (2006) 199 F.L.R. 303.

⁶⁰ *ibid.*, [66].

⁶¹ Bills Digest to the Security Legislation Amendment (Terrorism) Bill [No. 2] 2002 (Cth). The only difference between the UK and Australian cause elements is that the former refers to actions done or threats made "for the purpose of" advancing the cause and the latter to actions done or threats made "with the intention of" advancing the cause. The Bills Digest states: "Whether this disparity reflects a difference in operation or a difference in drafting style is unclear. Arguably both simply point to the motivation behind the conduct. It is significant that the focus on motivation, in addition to ordinary criminal intention, may cause problems in criminal trials". See also Kent Roach, "The Post-9/11 Migration of Britain's Terrorism Act 2000", in Sujit Choudhry (ed.), The Migration of Constitutional Ideas (CUP 2006), 386-389.

⁶² Terrorism Act 2000 (UK), Pt II.

⁶³ Terrorism Act 2006 (UK), s.5.

means that individuals may be prosecuted not only for their physical acts but also on the basis of discussions they might have had about preparations to commit a terrorist act. The significance of intercept evidence to the conviction of terrorists is clearly demonstrated by the aforementioned trial of Aweys and four other men. The most damning evidence against the three convicted men was a conversation in which Aweys requested permission from a Somali sheikh for "them" to engage in a terrorist attack on an Australian army base. There was also physical surveillance of a visit by one of the other convicted men, Wissam Fattal, to Holsworthy Army Barracks in Sydney. However, the purpose of this visit would have been unclear without the admission of Aweys' conversation into evidence. The Australian experience therefore undermines the UK assumption that the admission of intercept evidence would not lead to increased conviction rates for terrorist suspects.

The UK argument is further undermined by an examination of the use of intercept evidence as part of the control order and TPIM regimes. As discussed above, intercept evidence may be used in such proceedings. Control orders were issued in relation to 52 persons in the UK under the *Prevention of Terrorism Act* 2005.65 Nine notices imposing TPIMs are currently in force.66 However, both Clarke and the former Independent Reviewer of Terrorism Legislation, Lord Carlile of Berriew, have argued that the ability to use intercept evidence in criminal proceedings would not have led to the conviction of any of the people subject to a control order.67 This argument is counter-intuitive. There is no reason in principle why intercept evidence that is admitted in a control order proceeding could not also be used as a tool for securing a criminal conviction.

Clarke and Carlile's argument can only be sustained if intercept evidence has never been successfully relied upon in control order proceedings. It is difficult (if not impossible) to determine the extent to which intercept evidence has been so relied upon. Most of the evidence presented during control order proceedings is "closed", that is, both the type and content of the evidence is subject to strict non-disclosure requirements.⁶⁸ However, the Interception of Communications Commissioner has said that "[t]he interception of

⁶⁴ AAP, "Terror accused Wissam Mahmoud Fattal seen at army base", *Herald Sun* (Melbourne, September 14, 2010); Andrea Petrie, "18 years' jail for army terror-attack plan", *Sydney Morning Herald* (Sydney, December 16, 2011).

⁶⁵ David Anderson Q.C., Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005 (2012), 4.

⁶⁶ HC Deb, September 7, 2012, vol. 549, col. 38WS.

⁶⁷ Charles Clarke (n.49), cols 18-19WS; Lord Carlile of Bernew Q.C., Fifth Report (n.49), 25.

⁶⁸ For a discussion of this issue, see Adam Tomkins, "National Security and the Due Process of Law" (2011) Current Legal Problems 1.

communications continues to play a vital role in the battle against ... terrorism currently being fought by the UK's law enforcement and security agencies". This suggests that a significant part of the "closed" material in control order proceedings is likely to have been intercept evidence.

The logical consequence of the UK's prohibition on the use of intercept evidence in court proceedings is to force government agents to rely upon control order or TPIM, rather than criminal, proceedings. In contrast to the 52 control orders and nine TPIMs in the UK, only two control orders have been issued in Australia to date. Joseph "Jihad Jack" Thomas was convicted in February 2006 of receiving funds from a terrorist organisation and possessing a falsified passport. The Victorian Court of Appeal quashed the conviction on the basis that admissions made by Thomas had not been voluntary. A control order was issued in August 2006. In August 2007, an agreement was reached that another control order would not be sought and, in return, Thomas would abide by conditions identical to those contained in the control order until the conclusion of his retrial. At his second trial, Thomas was convicted of only the passport offence and was released with time served. David Hicks, one of two Australians detained at Guantanamo Bay, pleaded guilty before a United States military commission to providing support to terrorism. In April 2007, he was transferred to an Australian jail to serve the remaining nine months of his sentence. Upon his release in December 2007, a control order was issued. This order expired a year later and was not renewed.

This statistical comparison of the UK and Australia reveals that the latter has predominantly relied upon criminal prosecutions rather than control order proceedings to pre-empt the threat of terrorism. The strong likelihood is that the UK, if it were to repeal or relax the prohibition on the use of intercept evidence, could similarly return to a traditional criminal law approach in the anti-terrorism context.

V. NEGATIVE CONSEQUENCES OF THE USE OF INTERCEPT EVIDENCE

A. Impact on the intelligence-gathering process

In the UK, the Security Service ("MI5") is the lead agency in the interception of communications. 70 MI5 is responsible for "protecting the UK against threats to national security from

⁶⁹ Interception of Communications Commissioner, 2010 Annual Report of the Interception of Communications Commissioner (2011), 55.

⁷⁰ Interception of Communications Commissioner, Report of the Interception of Communications Commissioner for 2009 (2010), 14.

espionage, terrorism and sabotage, from the activities of agents of foreign powers, and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means."⁷¹ To this end, MI5 collects and assesses intelligence regarding national security threats to the UK. The argument has been made that if intercept material were disclosed in court proceedings, it would put at risk the "sensitive techniques and capabilities" of MI5 and reveal the identity of its agents to terrorists.⁷² This would seriously undermine MI5's ability to conduct effective terrorism investigations in the future.⁷³ However, the UK Home Affairs Select Committee concluded in January 2010 that "[o]ther states have adopted the use of intercept evidence without compromising the work of their security agencies so it is clear that a way can be found without impacting on security services too adversely".⁷⁴

The Australian experience demonstrates that the nature of intercept evidence is such that it will only rarely have the potential to prejudice the activities of intelligence agencies. Intercept evidence in a terrorism trial will most often consist of conversations between the defendant and his or her co-accused or between the defendant and another private citizen. The most likely issues to arise out of such evidence are the attribution of the conversation and the interpretation that should be placed upon it.⁷⁵ As to the former, the intercepting agency may be required to provide additional information about the time, location and circumstances in which the conversation was intercepted. However, such information is highly unlikely to reveal anything about the "sensitive techniques and capabilities" of intelligence agencies.

There are only two categories of intercept evidence that might conceivably prejudice the activities of intelligence agencies. Where such evidence is sought to be presented to the court, there are various tools at hand to minimise any such prejudice. Given this, to prohibit the use of intercept evidence altogether, would be "to throw the baby out with the bathwater".

The first situation is where the parties to the intercepted conversation are the defendant and an undercover officer. The defendant's right to a fair trial may require that the officer make

⁷¹ MI5, "What We Do" https://www.mi5.gov.uk/output/what-we-do.html accessed November 20, 2012.

⁷² Privy Council (n.27) 19-20; Oral Evidence of Charles Clarke, *Prevention of Terrorism Bill* (n.49), Ev. 8; Interception of Communications Commissioner (n.48) 11; Home Office (n.14), 23.

⁷³ Privy Council (n.27), 19.

⁷⁴ House of Commons Home Affairs Committee, *The Home Office's Response to Terrorist Attacks* (HC 2009-10, 117-I), 17.

⁷⁵ Interception of Communications Commissioner (n.48), 11.

himself or herself available for cross-examination. To do so would involve the officer revealing his or her identity. This is particularly problematic if the intercepting agency is ASIO; it is an offence to disclose the identity of an ASIO officer.⁷⁶ In this situation, there are three main options available to the intercepting agency. First, the agency could argue that the information is protected by public interest immunity.⁷⁷ However, if the intercepted conversation is of central importance to the prosecution case, this may not be an option. A successful claim of public interest immunity means that the intercepted communication may not be admitted as evidence in court proceedings. In this respect, it is a "blunt instrument".78 Secondly, the agency could rely upon the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) ("NSIA"). The NSIA sets out a process to determine how evidence that may prejudice national security should be dealt with. The court may, for example, be closed to the public or evidence may be admitted in a summary form, redacted or as a statement of facts that the evidence would establish. This regime is, however, rarely utilised.

The aforementioned trial of Aweys and four other men reveals a third option. In this case, one of the defendants sought to make out an argument that he had been entrapped by an undercover officer into making violent statements. The trial judge accepted that the defendant was entitled to cross-examine the officer. To protect the interests of the intercepting agency, the officer gave evidence via video-link and his identity was revealed to the minimum number of people possible. Only the judge, jury and defence and prosecution counsel were permitted to view the screens; the officer's identity was kept hidden from the defendants, the public and even the solicitors.⁷⁹

The second situation is where the intercepted conversation includes information about a current investigation. This information may well be excluded on the ground that it is irrelevant to the current proceedings. However, even if the information is relevant, the court may still grant a public interest immunity claim made by the agency conducting the investigation. Such a claim may seek to exclude the conversation in its entirety or, alternatively, to redact the offending material from the audio and written versions of the conversation.

⁷⁶ Australian Security Intelligence Organisation Act 1979 (Cth), s.92.

As it exists at common law or as codified in the *Evidence Act* 1995 (Cth).

⁷⁸ Australian Law Reform Commission, Keeping Secrets: The Protection of Classified and Security Sensitive Information, (ALRC 98, 2004), para. 8.209.

⁷⁹ Emma O'Sullivan, "Undercover officer gives evidence at terror trials", *ABC News* (Sep 23, 2010) http://www.abc.net.au/news/2010-09-22/undercover-officer-gives-evidence-at-terror-trial/2269988 accessed November 20, 2012.

B. Impact on law enforcement investigations

MI5 is currently prepared to share intercepted material with law enforcement agencies. This enables law enforcement agencies to conduct more effective investigations into criminal activities. However, this cooperation takes place on the assumption that the material will not be used as evidence in court. If there were the potential for intercept evidence to be disclosed in court proceedings, it is a distinct possibility that MI5 might refuse to share intercepted material. The Privy Council has said that "[s]uch a reduction in cooperation could have a profound impact on law enforcement agencies' ability to combat serious crime and terrorism in the UK."80

The opaque nature of intelligence agencies makes it difficult to assess any potential impact on the willingness of agencies to share information resulting from telecommunications intercepts. However, in Australia, there has been no obvious adverse impact. Indeed, in Australia, investigations into terrorism offences are generally conducted by a number of different intelligence and law enforcement agencies working cooperatively. For example, a 2004 to 2005 investigation that resulted in the arrest, and ultimately the conviction, of nine Sydney men was a joint investigation of the New South Wales Police Force, the Australian Federal Police, New South Wales Crime Commission and ASIO.81 Further, ASIO frequently shares its intelligence with law enforcement agencies. In 2002, Dennis Richardson, the Director-General of ASIO, gave evidence to the Senate Legal and Constitutional Affairs Committee that "[w]e do share information with the AFP and state police, and that is under agreed protocols."82

C. Financial burden of collating and transcribing intercept material

The use of intercept evidence would impose a significant burden on the human and financial resources of MI5 by requiring the collation and transcription of huge quantities of intercepted material.⁸³

⁸⁰ Privy Council (n.27) 19.

New South Wales Government, "Timeline of Events – Operation Hammerli / Pendennis Eden" http://bit.ly/Hammerli-Pendennis-Eden accessed November 20, 2012.
 Senate Legal and Constitutional Affairs Committee, Australian Parliament, Parliamentary Debates (November 12, 2002), L&C 5.

⁸³ Oral Evidence of Charles Clarke, in Joint Committee on Human Rights, Counter Terrorism Policy and Human Rights: Terrorism Bill and Related Matters Oral Evidence, (2005-06, HL 75-II, HC 561-II), Ev. 14; Home Office, Intercept as Evidence: A Report (Cm. 7760, 2009), 7; Lord Carlile of Berriew Q.C., Fifth Report (n.49), 25; Interception of Communications Commissioner (n.48), 11. This organisation currently has a staff of about 3,800 persons (MI5, "Staff" < https://www.mi5.gov.uk/output/staff-and-management.html > accessed November 20, 2012) and an annual

The Interception of Communications Commissioner offered an example of the potential monetary costs of transcription:

"In a recent case a court felt it had to order that 16,000 hours of eavesdropping (not intercept) material must be transcribed at the request of the defence. I believe that the cost was of the order of £1.9 million. The work and cost in intercept cases would be very great indeed, and quite disproportionate to any perceived advantage."

The allocation of MI5 employees to the task of collation and transcription would take away from the primary function of this organisation, namely, to protect the UK from terrorist and other security threats. This was highlighted by the Interception of Communications Commissioner in his 2005-2006 Annual Report:

"The workload for the intelligence and law enforcement agencies in preserving and presenting intercept product as evidence would be very severe indeed, and very expensive, and would distract them from the work which they should be doing, and also from the work they are actually doing, so greatly reducing as opposed to increasing the value of the intercept."

The Australian experience bears out the argument that the burden of collating and transcribing intercept material is a significant one. For example, in the Operation Hammerli trial before the New South Wales Supreme Court, 127,000 conversations were intercepted. Of these, 30,000 were included in the brief of evidence and 448 calls were ultimately played to the jury. However, the burden does not necessarily justify a blanket ban on intercept evidence. This is for two reasons. First, a large proportion of the burden of collating and transcribing intercept material would fall upon an intercepting agency regardless of the admission of intercept evidence in court proceedings. Transcription is necessary in order for the intercepting agency to keep track of an investigation and to identify other persons and avenues which should be investigated. As has already been discussed, MI5 often briefs law enforcement agencies and prosecutors about any intercepted material. It would be fair to assume that, in the course

budget of 2.1 billion pounds (MI5, "Funding" < https://www.mi5.gov.uk/output/funding.html accessed November 20, 2012).

⁸⁴ Interception of Communications Commissioner (n.48) 11.

⁸⁵ ibid.

⁸⁶ Christopher Craigie, "Management of Lengthy and Complex Counter-Terrorism Trials: An Australian Prosecutor's Perspective" (AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney, September 8, 2011).

⁸⁷ MI5, "Day in the Life" https://www.mi5.gov.uk/careers/working-at-mi5/day-in-the-life.aspx?id=131 accessed November 20, 2012.

of these briefings, careful notes (if not full transcriptions) of the intercepted material are provided. Secondly, practices have emerged in the Australian context whereby the burden on the intercepting agency is reduced. Only those conversations that are included in the prosecution brief of evidence are transcribed in full. The remaining conversations are provided on CDs, generally with a brief summary of the conversation made in real-time by the intercepting officer. It is for the defence to obtain transcriptions of these conversations as they see fit. Given the limited resources of the defence, this situation may not be ideal. However, it does have the effect of distributing the burden of collating and transcribing intercept material between the intercepting agency and the defence.⁸⁸

D. Accessibility of intercept material

The accessibility of intercept evidence has also been questioned. The Interception of Communications Commissioner claims that:

"Criminals and terrorists do not speak in a language which is readily comprehensible to juries, even if their native language is English. Many conversations are in foreign languages or slang. In those that are not, they use their own particular language."89

This means that interpreters would often be required at trial or, at the very least, to provide translations of the material for the jury to follow. This is problematic because "interpreters and translators very rarely agree upon the meaning of anything, and there is never any difficulty in finding one interpreter who will disagree with another." However, interpreters are frequently used at other stages of the criminal process, such as during the arrest, interviewing and charging of terrorist suspects who speak little or no English. At trial, they may be used where the defendant or another person with poor English skills gives evidence. Furthermore, in order for intelligence agencies to use intercept evidence effectively in the intelligence-gathering process, it will be necessary for them to have any conversations in a foreign language translated.91

In Australia, the courts have found a relatively easy means of getting around this language difficulty by providing English transcripts of each conversation to the jury. This also serves the purpose of giving the jury a reference point where the sound quality of a particular audio recording is poor. These transcripts are generally

⁸⁸ This information has been obtained from counsel involved in Australia's terrorist trials.

⁸⁹ Interception of Communications Commissioner (n.48), 11.

⁹⁰ ibid

⁹¹ "Day in the Life" (n.87).

agreed between the parties. However, if there is a disagreement, the transcript will either use the word in its original language (for example, "jihad") or make a note of the two competing translations. Witnesses will then give evidence at trial as to which of the translations they believe to be correct. It must be kept in mind that it is the audio recording of a conversation which is the evidence, and the transcript is merely an aid. Therefore, in addition to providing the jury with a transcript, any recordings in English will be played onto the court record. If the recording is in a foreign language, the English translation will be read onto the court record by a barrister briefed for this purpose. 92

There is a further reason (albeit not given much attention in the UK) why intercepted material might be regarded as inaccessible for juries. As the Operation Pendennis trial demonstrates, there are often a massive number of intercepted conversations put before the jury. To assist juries in navigating through the many telecommunications intercepts, a tool that has been used is the provision of charts summarising the conversations to the jury. These charts set out full particulars of the conversations, the participants in them and the date and time they occurred. It is not permissible to include summaries of the contents of these conversations as that would be "conclusionary or argumentative". 93

E. Impact on length of terrorism trial

The complicated nature of terrorism offences, and the often circumstantial evidence making up the prosecution case, means that terrorism trials will inevitably be longer than most other criminal proceedings. The UK Interception of Communications Commissioner said that "[a]dmitting intercept evidence would take a very long time, and would greatly increase the length of already over-long trials and the expense involved." However, the longest Australian terrorism trial was 10 months with an additional month of jury deliberations. This is shorter than the longest trial in the UK. Even without the use of intercept evidence, the trial of seven defendants in the UK "fertiliser plot" case lasted over a year. Therefore, the argument

⁹² Christopher Craigie (n.86).

⁹³ R. v. Benbrika & ors (Ruling No. 11) [2007] VSC 580 [18], [32].

⁹⁴ Interception of Communications Commissioner (n.48), 11.

⁹⁵ James Madden, "Sydney Terror Case Legal Costs Hit a High at \$9m", The Australian (Sydney, October 17, 2009). There was also an additional eight months of pre-trial argument.

⁹⁶ "The Fertiliser Plot", in Crown Prosecution Service, "The Counter-Terrorism Division of the Crown Prosecution Service (CPS) - cases concluded in 2007" http://bit.ly/CPS-CTD-2007> accessed November 20, 2012.

that the admission of intercept evidence would automatically result in lengthier terrorism trials simply cannot be sustained.

The main reason why opponents argue that intercept evidence would result in longer trials is because defence counsel "would impose exhaustive demands on the prosecution and courts in an attempt to ascertain the very details of the methodology about how a mobile phone call is intercepted". This has not, however, proven to be the case in Australia. The Australian courts have developed techniques for minimising time-wasting. In many terrorism trials, extensive pretrial conferences have been held between the parties to sort out, by consent, as many evidentiary issues as possible. It is only if an agreement cannot be reached about attribution, interpretation and the inadmissible parts of an intercept that the court will need to hear argument and resolve the matter. In relation to voice attribution, the Commonwealth Director of Public Prosecutions has explained the usual approach:

"[I]t was assumed that, unless otherwise informed, voice attribution in the intercepted conversations would not be challenged. In the absence of formal admissions and with the strong support of the trial judge in each case, these assumptions provided a much needed framework for the more efficient conduct of these proceedings and helped to render manageable what could very easily have become unduly lengthy and unmanageable trial proceedings." 98

In contrast to the UK's approach, common sense suggests that the admission of intercept evidence may actually have the effect of decreasing the length of terrorism trials. This is for two reasons. First, most categories of evidence require a witness to appear in court. For example, human surveillance requires the officer to give evidence as to the movements of the defendants and to answer any questions in cross-examination. In contrast, intercept evidence generally speaks for itself (except in cases where an interpreter is required). Second, the use of intercept evidence may in fact remove the need for a trial to be held. This is because "the weight of evidence obtained through telecommunications interception results in defendants entering guilty pleas, thereby obviating the need for the information to be introduced into evidence".99

⁹⁷ Arthur Hayes, "UK Counter Terrorism and Electronic Intercept Evidence", *The Heptagon Post* (London, June 17, 2011).

⁹⁸ Christopher Craigie (n.86).

⁹⁹ Attorney-General's Department, Australian Government, Telecommunications (Interception and Access) Act 1979: Report for the Year Ending 30 June 2011 (2011), 47.

F. Keeping pace with technological change

The UK has argued that any new legislative scheme permitting the use of intercept evidence would be made redundant by the speed of technological change. 100 In evidence submitted to the Joint Committee on Human Rights, the Home Office stated that in its study on the use of intercept material as evidence, it found that "new technology would make evidential use more, not less, difficult to achieve, not least because of the inherent complexity and diversity of IP communications and the potential difficulties in accrediting the interception systems involved to an evidential standard."101 There is no doubt that it is difficult for both governments, in enacting interception legislation, and intercepting agencies, in applying for and carrying out warrants under this legislation, to keep pace with technological change. This includes the development of new methods of communication (for example, instant messages, which are currently not covered by the TIA Act) as well as technologies for detecting interception devices. However, this does not bear out the UK's argument. These are difficulties already faced by governments and intercepting agencies. They do not affect the admission of intercept material into evidence.

G. Consistency with human rights

The objection has been raised in the UK that the admission of intercept evidence would violate the right to a fair trial in Article 6 of the European Convention on Human Rights. The former Home Secretary, Alan Johnson M.P., stated:

"This testing has demonstrated that the model, if fully funded ... would not be legally viable, in that it would not ensure continued fairness at court. This has been confirmed by a recent European Court of Human Rights case (*Natunen v. Finland*). The result would be to damage rather than enhance our ability to bring terrorists and other serious criminals to justice." ¹⁰²

Three points should be made in response to this. First, many European countries permit the use of intercept evidence in court

Oral Evidence of Charles Clarke, Prevention of Terrorism Bill (n.49), Ev. 8; Joint Committee on Human Rights (n.49), 59; Oral Evidence of Tony McNulty M.P., in Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning (2006-07, HL 157, HC 394), Ev. 33.

¹⁰¹ Joint Committee on Human Rights (n.49), 59.

House of Commons Written Ministerial Statements, "Intercept as Evidence" (December 10, 2009), referring to Naturen v. Finland [2009] ECHR 2066, (2009) 49 E.H.R.R. 32.

proceedings. 103 Secondly, there is nothing in either the terms of the European Convention or the judicial interpretation of this document to suggest that it would be an infringement of human rights simply to admit intercept evidence. Rather, the jurisprudence suggests that there may be human rights issues with certain types of intercept evidence, for example, intercept evidence obtained illegally. 104 Thirdly, the European Court in Natunen¹⁰⁵ found that there had been a breach of the right to a fair trial because of the destruction of intercepted material prior to Mr Natunen's trial on drug trafficking This made it extremely difficult (if not impossible) for Mr Natunen to have his claim of innocence verified. 106 The real issue that this case raises is not whether the admission of intercept evidence is consistent with the European Convention; but rather whether the failure to disclose this evidence to the defence violates the "equality of arms" principle.

The above quotation suggests that it would be impossible to design a model for admitting intercept evidence in court proceedings that complied with this principle. This is because of the purported need to keep intercepted information - which may contain information about the operations of MI5 or information which may present a risk to national security if disclosed – secret from the public and especially the defence. As argued above, intercept evidence will only rarely contain information that should not be disclosed. In any event, the UK has already developed techniques in the control order context, such as the requirement that a person should be provided with the "gist" of the case against them¹⁰⁷ and the provision for special advocates, 108 to protect the right to a fair trial as well as national security.

It is difficult to compare the Australian and UK experiences in relation to this issue. This is because Australia does not have either a statutory or constitutional charter of rights. While the High Court of Australia has recognised that there are rights deriving from the separation of powers in the Australian Constitution (for example, to be free from punitive detention except as a result of a judicial

¹⁰³ See, for example, France, Netherlands, Ireland and Spain: Privy Council (n.27), 31-35. ¹⁰⁴ Prosecutor v. Radoslav Brdjanin, Case No. IT-99-36-T, "Decision on the Defence 'Objection to Intercept Evidence" (October 3, 2003) (International Criminal Tribunal

for the former Yugoslavia). 105 (n.102.)

¹⁰⁶ ibid., [18].

¹⁰⁷ Secretary of State for the Home Department v. A.F. (No. 3); Same v. A.N.; Same v. A.E. [2009] UKHL 28, [2010] 2 A.C. 269.

Prevention of Terrorism Act 2005 (UK), Sched., para. 7.

finding of criminal guilt),¹⁰⁹ the obligations imposed on the UK by the European Convention on Human Rights are significantly more rigorous. The only aspect of the intercept regime which has been the subject of constitutional challenge in Australia is the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth). In *Lodhi v. R.*,¹¹⁰ the New South Wales Court of Criminal Appeal held that the requirement in section 31(8) that the court must give greater weight to the risk to national security than the defendant's right to a fair trial was constitutional.

H. Overuse of telecommunications intercepts

In the interest of comprehensiveness, there is one further argument that might be made against the use of intercept evidence. This argument has not, however, been explored in any detail in the UK. This argument is that admitting intercept evidence may result in the overuse of intercept warrants. The consequence is that the individual's right to privacy would be disproportionately infringed. There is some evidence to bear this argument out in the Australian context. In the 2010/2011 financial year, applications were made for 3,495 interception warrants in Australia. It is worth noting that, despite Canada's population being more than one and a half times that of Australia, there were only 397 telecommunications intercepts in that jurisdiction in the same period. 112

However, two points should be made. First, Canada, like Australia, allows for intercept material to be used as evidence in terrorism proceedings. Therefore, even if the interception power is being overused in Australia, it is unlikely that the admissibility of intercept evidence is to blame for this phenomenon. Secondly, only a small proportion of the intercept warrants issued in Australia were for the investigation of terrorism offences (104). In contrast, 1,222 were for drug offences. This contrasts sharply with ASIO's comments about the number of counter-terrorism investigations in which it is involved. In May 2011, the Director-General of ASIO stated that: "[E]ach year ASIO responds to literally thousands of counter-terrorism leads ... we are currently involved in several hundred counter-terrorism investigations and inquiries." A comparison of

¹⁰⁹ The Hon. Michael McHugh, "Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?" (2001-2002) Bar News: The Journal of the New South Wales Bar Association 34.

^{110 (}n.59.)

¹¹¹ Attorney-General's Department, Australian Government (n.99), 18.

¹¹² Public Safety Canada, Canadian Government, "Annual Report on the Use of Electronic Surveillance" (2010), 12.

¹¹³ Attorney-General's Department (n.111), 36.

¹¹⁴ *ibid*.

the number of interception warrants sought with the number of counter-terrorism investigations in which ASIO is involved suggests that far from overusing these warrants, ASIO is, in fact, exercising considerable restraint in this field.

VI. CONCLUSION

This article commenced by making the claim that Australia and the UK have taken a pre-emptive approach to countering terrorism in the decade since 9/11. However, the UK's prohibition on the use of intercept evidence has, in practice, led to quite different pre-emptive strategies being adopted in Australia and the UK. Australia has, with only a couple of exceptions, relied upon traditional criminal prosecutions to pre-empt the threat of terrorism. Intercept evidence has been relied upon heavily by the prosecution in these cases. The Commonwealth Director of Public Prosecutions, Chris Craigie S.C., has stated:

"I should note the importance that telephone-intercept and listening device evidence plays in many of our large CT prosecutions. The product of intercepts under warrants is admissible in Australian courts. We have used such material for many years, most significantly in major drug importation cases and to great effect. Our state and territory counterparts are also very experienced in their value at trial. Similarly in CT prosecutions it can and has provided extremely persuasive evidence of the guilt of the alleged offenders and in our two most recent multi accused trials in Victoria and New South Wales, such evidence was the essential core of the Crown case."

In contrast, in the UK, considerably more control orders have been made and TPIMs imposed. This is in large part because the prohibition on the use of intercept evidence often makes criminal prosecutions unsustainable. Therefore, the UK has been forced to resort to executive detention and civil orders to prevent suspected terrorists from carrying out attacks.

There are, of course, normative concerns about Australia's reliance on preparatory offences that capture conduct well in advance of the commission of a terrorist act. In particular, such offences might be regarded as involving the criminalisation of talk or even thought. However, it is nevertheless preferable for persons to be prosecuted for criminal offences than to be made the subject of civil orders imposing serious restrictions upon their liberty. Control orders are "a second-best solution". ¹¹⁶ As Lynch and Williams point out:

¹¹⁵ Christopher Craigie (n.86).

¹¹⁶ David Anderson Q.C. (n.65), 31.

"[Control orders and preventative detention orders] illustrate the tension in employing the law as a tool of preventive policy. They challenge the traditional purpose of legal regulation. Under neither order is there a need for a person to have been found guilty of, or even be suspected of committing a crime. Yet both orders enable significant restrictions on individual liberty. This is more than a breach of the old 'innocent until proven guilty' maxim: it ignores the notion of guilt altogether."

The criminal trial process carries with it safeguards that the process for issuing preventative orders lacks. These safeguards include: the presumption of innocence; the criminal standard of proof (beyond reasonable doubt); the right to silence; and the privilege against self-incrimination.

The Australian experience, as discussed in this article, also undermines the UK's argument that the disclosure of intercepted material in court proceedings would have adverse consequences on both investigations and the trial process. Australian interception agencies have not identified any such consequences. Nor has there been any suggestion in Australia that the use of intercepted material has reduced the willingness of intelligence agencies to share information with law enforcement agencies and prosecutors. The Australian system has managed to overcome a range of practical problems, such as language issues or the vast quantity of material created by intercepting agencies, with practical responses. These include the use of interpreters and written aids, such as charts, in the courtroom, and by sharing the burden of transcription between the State and the defence. Australia has also attempted to find a middle ground between the protection of national security, including the secrecy of the techniques by which intelligence agencies gather material, and the defendant's right to a fair trial.

These factors, as well as the clear advantages of criminal over executive proceedings, provide a strong case for the UK to abandon its prohibition on the use of intercept evidence. At the very least, the UK should allow such evidence to be used in terrorism-related prosecutions.

Andrew Lynch and George Williams, What Price Security? Taking Stock of Australia's Anti-Terror Laws (UNSW Press 2006), 42.

TRIAL BY JURY, TERRORISM AND GANGS: A COMPARATIVE STUDY OF IRELAND AND NEW ZEALAND

FERGAL F. DAVIS*

ABSTRACT

In the common law world trial by jury has a totemic position. In many countries, including the jurisdictions under consideration, it is perceived to be the norm for criminal trials. However, trial by jury is repeatedly undermined: characterised as arbitrary and susceptible to bias and intimidation. That process is all the more acute in the context of counter-terrorism where limitations on jury trial have become common even in states where there is a general commitment to the criminal jury. This article will examine the retrenchment of trial by jury for cases of suspected terrorism in Ireland and New Zealand. It will compare the legal histories and legislative provisions to determine if any discernible pattern emerges common to both jurisdictions — particularly focusing on a blurring of the distinction between gang crime and terrorism. The potential for this to impact on the wider viability of the institution of trial by jury will be considered.

The right to trial by jury enjoys an exalted place within the pantheon of human rights. It is often (wrongly) said to be derived from the Magna Carta.¹ Blackstone declared it to be the bulwark of liberty;² Devlin stated that:

"The first object of any tyrant ... would be to make parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."

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¹ Penny Darbyshire, "The Lamp That Shows That Freedom Lives – is it worth the candle?" [1991] Crim.L.R. 740, 742.

William Rodolph (W.R.) Cornish, The Jury (Allen Lane 1968), 126.

³ Sir Patrick Devlin, *Trial by Jury* (Methuen 1966) 164.

To emphasise the hallowed position of the jury, a number of countries have recently adopted or re-adopted trial by jury for criminal trials.⁴ Despite this apparently totemic status, the jury is something of a legal enigma. The European sociologist Max Weber struggled with the inherent irrationality of jury trial. On the one hand, the emergence of trial by jury signified a departure from "charismatic legal revelation - from law prophet - to something more rational"; on the other, the jury retains the power arbitrarily to disregard the law.⁵ That arbitrariness has led some to describe trial by jury as "Khadi justice". Others, adopting a more measured tone, present jury trial as "an anti-democratic, irrational and haphazard legislator".7 In addition to such criticisms, research has identified some apparent structural problems with trial by jury. In particular, evidence has emerged suggesting that juries fail to comprehend complex and complicated evidence,8 and concerns persist about the potential for juror bias to undermine the right to a fair trial.9 Combined, these concerns contribute to a general undermining of the institution of trial by jury.

Counter-terrorism provides a particularly difficult context for trial by jury, and Ireland and New Zealand are not alone in their partial rejection of jury trial in that situation. The United States has employed jury trial in a number of high profile terrorism cases, but policy makers seem to feel that the creation of a regime of exception at Guantánamo Bay precludes jury trial from playing an active role in that context.¹⁰ Kent Roach has argued that the avoidance of ordinary criminal trial processes (including jury trial) in the case of

⁴ For example, variations of trial by jury have been adopted in Argentina, Japan, Russia and Spain: Gregory W. O'Reilly, "Opening up Argentina's courts" (1997) 80(5) Judicature 237; Robert M. Bloom, "Jury trials in Japan" (Boston College Law School research paper no. 66, 2005), 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=688185 accessed November 5, 2012; Stephen C. Thaman, "Europe's New Jury Systems: the cases of Spain and Russia" (1999) 62(3) Law and Contemporary Problems, 233-259.

⁵ Paul Walton, "Max Weber's Sociology of Law: a Critique", in Peter Hamilton (ed.) *Max Weber: Critical Assessments 1* (Routledge 1991) 287, 293-94.

⁶ Julius Paul, "Jerome Frank's Views on Trial by Jury" (1957) 22 Missouri Law Review 28, 36.

⁷ Darbyshire (n.1), 750.

⁸ Roger Matthews, Lynn Hancock, Daniel Briggs, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: a Study in Six Courts,* Home office Online Report 05/04 (2004) http://library.npia.police.uk/docs/hordsolr/rdsolr0504.pdf accessed September 11, 2012.

⁹ Laura McGowan, "Trial by Jury: Still a Lamp in the Dark?" (2005) 69 Journal of Criminal Law 518.

¹⁰ Fiona de Londras, "Guantánamo Bay, the Rise of the Courts and the Revenge of Politics" in David Jenkins, Anders Henriksen, Amanda Jacobsen (eds), *The Long Decade: How 9/11 has Changed the Law* (forthcoming, Oxford University Press 2012) http://papers.ssm.com/sol3/papers.cfm?abstract_id=1968127 accessed November 5, 2012.

Khalid Sheik Mohammed is a "symbolic rejection of criminal justice norms".11 In Northern Ireland, the United Kingdom government abandoned jury trial for terrorism cases as far back as 1973.12 Even countries that have adopted the jury system fairly recently have seen fit to restrict access to jury trial for terrorism suspects. Russia readopted jury trial in 1991 as part of wider attempts to humanize the legal system in the post-Soviet era.¹³ However, by 2008, the legislation providing for jury trial had been amended to exclude terrorism cases.¹⁴ This internationally observable trend away from jury trial in cases of suspected terrorism provides the context for the retrenchment of jury trial in Ireland and New Zealand. experiences of terrorism and counter-terrorism in Ireland and New Zealand are very different, and the history of non-jury trial for subversive or terrorist cases is significantly longer in Ireland. However, despite the differences, there is a discernible pattern common to both jurisdictions. In particular, that pattern has involved a blurring of the distinction between gang-related and terrorist offences, and an attendant attempt to reduce access to trial by jury for both kinds of cases.

This article will seek to establish the existence of such a pattern and examine its implications for the right to trial by jury. This will be of particular interest to Ireland and New Zealand, but there is potential for other jurisdictions to draw lessons from these experiences. The article will begin by justifying the selection of Ireland and New Zealand as comparator countries. It will then outline the legislative measures limiting the right to trial by jury in those jurisdictions. The commonalities of legislative approaches will be explored. The broader socio-legal justifications which have been advanced to limit the right, and the general context within which the right exists in both states, will be identified. The potential of these measures for a broader impact on the right to trial by jury in the two jurisdictions will be considered. Ultimately, the article will discuss whether there is anything that the experience of Ireland and New Zealand can teach each other and add to our understanding of the role of the jury in the criminal justice system.

¹¹ Kent Roach, "The Criminal Law and its Less Restrained Alternatives" in Victor V. Ramraj, Michael Hor, Kent Roach, George Williams (eds), Global Anti-Terrorism Law and Policy (Cambridge University Press 2012) 91-121, 108.

¹² Northern Ireland (Emergency Provisions) Act 1973.

¹³ Stephen C. Thaman, "The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond" (1997) 40 Cornell International Law Journal 355, 357

¹⁴ Federal Law 321 – FZ on Amendments of Legislative Acts Concerning Counterterrorism, adopted December 30, 2008.

I. SAINTS, SCHOLARS AND LONG WHITE CLOUDS

Fable 1. Population Profiles of Ireland and New Zealand

	Domination	Largest Urban Agglomeration	Population	Rural Population
	1 Opulation	(as a percentage of the total)	Density	(as a percentage of the total)
Ireland	4,437,000	Dublin - 1,059,000 (23%)	63.1 <i>per</i> sq. km	1,747,000 (39%)
New Zealand	4,230,000	Auckland - 1,245,000 (30%)	15.6 <i>per</i> sq. km	594,000 (14%)

The comparator countries

New Zealand make Ireland ideal comparators. The two states are Englishspeaking, and have a shared history of British imperial rule. This past has influenced the legal system of both states, which have adopted the common law legal tradition including a general commitment to trial by jury. Furthermore, both states have supplemented the common law with Bills of Rights: and the right to trial by jury is given some level of protection within both legal systems. 15 The jury is the norm for serious criminal trials, deviation from it the (the relevant provisions in both states will be analysed, post). Thus, from a legal culture point of view, the jury occupies a central position in both states.

It has been argued that population size and dispersal are relevant to discussion about trial by jury, because it is more feasible to maintain jury anonymity in "a vast country with a huge population such as the United States", whereas "the small and dispersed nature of Irish society means that the risk of jury-tampering and intimidation will remain a significant one". ¹⁶ The populations of both states are similar, as Table 1 (left) outlines. ¹⁷

There are acknowledged population differences. Population density is not similar

¹⁵ Bunreacht na hÉireann (Constitution of Ireland), Art. 38.5; Juries Act 1981 (New Zealand); Neil Cameron, Susan Potter, Warren Young, "The New Zealand Jury" (1999) 62(2) Law and Contemporary Problems 103.

¹⁶ Report of the Committee to Review the Offences Against the State Acts, 1939-1998 and Related Matters (Hederman Report) (Government Publications 2002), para.9.29 http://bit.ly/IE-Hederman-Report accessed 5 November 2012.

¹⁷ The figures for Ireland's population, population density and urban agglomeration for this table are at <http://bit.ly/UNdata-IE; comparable figures for New Zealand are at <http://bit.ly/UNdata-NZ accessed November 5, 2012; the figures for rural population are derived from the United Nations Department of Economic and Social Affairs, World Urbanization Prospects: the 2009 Revision http://esa.un.org/unpd/wup/index.htm accessed November 5, 2012.

and, despite being more densely populated, Ireland has a larger rural population than New Zealand. Population density may have potential consequences for jury anonymity and thus contribute to jury intimidation, though it has not been possible to quantify that risk.

The similarities between the two states provide some basis for comparison, but there are significant differences which will allow for potentially fruitful discussion. On the face of it, both states have a significant history of anti-terrorism legislation, but this is only true in the sense that both states have a history of *legislating* against terrorism. 18 Ireland has a long history of domestic terrorism and insurgence – the Irish Free State was born out of a war of independence fought using guerrilla tactics¹⁹ - and Ireland has repeatedly employed exceptional powers since independence in 1921. The activities of the Irish Republican Army (IRA) throughout the 1920s and '30s generated draconian responses from the government of the Irish Free State and, after the adoption of the 1937 Constitution, terrorist activity remained a significant threat to the stability of the state - most notably during "the Troubles", the period of violence between 1969 and 1996 associated with political violence in Northern Ireland. The history of anti-terrorism in New Zealand was more pre-emptory - being predominantly influenced by concerns regarding anticipated external terrorism such as hostage taking and aeroplane hijacking, rather than an existent domestic threat, or a threat to New Zealand interests abroad. Thus, although New Zealand has had anti-terror measures on the statute books since 1956, it arguably did not experience terrorism until the mid-1980s: the first terrorist incident in New Zealand was the 1985 sinking of the Rainbow Warrior in Auckland Harbour; and this was followed in 1987 by the attempted hijacking of an Air New Zealand plane in Fiji, following a coup d'état there. So both states have a history of anti-terrorism legislation, although Ireland has had significantly greater experience of enforcing those measures. The different justifications for promulgation of these measures as well as the different context within which they operated help to explain the

¹⁸ This record of legislating against terrorism can be contrasted with, for example, Australia. Prior to September, 2001, Australia did not have any general antiterrorism powers, but it did have legislation criminalising specific acts that could amount to terrorism – such as the *Crimes (Aviation) Act* 1991 (Cth), Pt 2, dealing with offences relating to the hijacking of aircraft. George Williams calculates that there have been 54 pieces of anti-terrorism legislation in Australia since 2001. George Williams, "A Decade of Australian Anti-Terror Laws" (2011) 35 Melbourne University Law Review, 1136. For a history of terrorism laws in Australia, see Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press 2003).

¹⁹ See Michael Hopkison, *The Irish War of Independence* (McGill-Queens University Press 2004); or, for a firsthand account, Tom Barry, *Guerilla days in Ireland: a firsthand account of the Black and Tan war (1919-1921)* (Devin-Adair Co. 1956).

apparently different focus: Irish measures, including restriction on trial by jury, were focused on the detention or prosecution of terrorist offenders; in New Zealand the focus was on security and intelligence measures and the prohibition of hijacking and hostage taking.

In recent years, Ireland has experienced something of a shift in the focus of its criminal justice system, towards what might best be described as a criminal control model.²⁰ The focus is no longer directed towards terrorism but towards organised criminal gangs.²¹ In that context, the seamless transition in Ireland from non-jury trial for subversive offences towards non-jury trial for gang-related activity can be contrasted with New Zealand. As will be discussed, one of the justifications for the introduction of the New Zealand *Crimes Amendment Act (No. 2)* 2008 – which allows for non-jury trial – was the potential for jury intimidation in gang-related cases.²² Terrorism was not a primary motivation for the introduction of non-jury trial in New Zealand; however, as we shall see, the first use of those provisions arose in the context of terrorism. These developments provide an almost mirror image of each other, and are worthy of discussion on that basis alone.

II. ERODING THE RIGHT TO JURY TRIAL

The history of trial by jury in the common law world can be traced back to King Henry II of England (1154-1189). At that time parties to land disputes were given the option of resolving their disputes through a judicial duel or having the matter determined by a jury of twelve knights.²³ Early juries were selected not for their impartiality but because of their local knowledge as an "evidentiary and investigative rather than a decision making body".²⁴ Given the view of the jury as the "bulwark of liberty"²⁵ which later emerged, it is noteworthy that early juries were susceptible to pressure and intimidation from the Crown and the judiciary.²⁶ By the mid-

²⁰ Vicky Conway, Michael Mulqueen, "The 2009 Anti-Gangland package: Ireland's new security blanket?" (2009) 19(4) *Irish Criminal Law Journal* 106.

Patrick A. McInerney, "Do we need a Jury? – Composition and Function of the Jury and the Trend Away from Jury Trials in Serious Criminal Cases" (2009) 19(1) Irish Criminal Law Journal 9.

²² As debated in the context of a proposed *Criminal Procedure Bill*: Judith Collins M.P., *N.Z. Parliamentary Debates (Hansard)* June 29, 2004, vol. 618, 14223.

²³ Ann Lyons, Constitutional History of the United Kingdom (Cavendish 2003), 33.

²⁴ *ibid.* For a broad-ranging exposition of the history of jury trial – and especially of the jury as an investigative body – see Peter Lowe, "Challenges for the Jury System and a Fair Trial in the Twenty-First Century" [2011] J.C.C.L. 175, 178-180.

²⁵ Cornish (n.2), 126.

²⁶ *ibid.*, 128-29.

nineteenth century, something approximating the modern jury had emerged, and Alexis de Tocqueville declared that:

"Using juries for the suppression of crime appears to me the introduction of a predominantly republican institution into government ... The jury may be aristocratic or democratic according to the class which supplies the juries, but it always retains a republican character in that it entrusts the actual control of society into the hands of the ruled, or some of them, rather than into those of the rulers."²⁷

In the rhetoric of Lord Devlin the jury is idealised as a "little parliament".²⁸ Despite the chequered history of the institution, the beguiling rhetoric of Blackstone, de Tocqueville and Devlin has held sway over the popular imagination and, where it has been employed, trial by jury has secured an exalted position for itself.

A. Trial by jury in Ireland

There is insufficient scope within this article to consider the history of coercive anti-terror legislation in Ireland²⁹ – for example, between the Act of Union 1801 and 1882, there were 57 special Acts of the United Kingdom Parliament aimed at addressing disaffection in Ireland.³⁰ There is not even sufficient space to outline the history of non-jury trial in Ireland.³¹ However, before we can begin an examination of the Irish legislative provisions we must first take account of some key points. Following a protracted war of independence with Great Britain, the Irish Free State emerged in 1921 as a Dominion of the British Empire with the same constitutional status as the Dominion of Canada.³² The Irish Free State was not universally popular, and the new state faced an immediate existential threat in the form of civil war between "Free Staters" who supported the Anglo-Irish Treaty, and "Die-hards" who opposed anything less than a full republic.³³ At this point, "there was no state and organized forces. The provisional government was simply eight young men in the City Hall standing amidst the ruins of one administration, with the foundations of another not yet laid, and with

²⁷ Alexis de Tocqueville, *Democracy in America and two essays on America*, (Gerald E. Bevan trans., Penguin Books 2003), 317-18.

²⁸ Devlin (n.3), 164.

²⁹ See Lewis Perry Curtis, *Coercion and Conciliation in Ireland, 1880-1892: a Study in Conservative Unionism* (Princeton University Press 1963).

³⁰ Dorothy Macardle, *The Irish Republic* (Corgi Books 1968), 49.

³¹ For a detailed examination of these issues, see Fergal F. Davis, *The History and Development of the Special Criminal Court 1922-2005* (Four Courts Press 2007).

³² http://www.nationalarchives.ie/topics/anglo-irish/dfaexhib2.html accessed November 5, 2012.

³³ J.J. Lee, Ireland 1912-1985: Politics and Society (Cambridge University Press 1989), 56-69.

wild men screaming through the keyhole".³⁴ In response to the chaos, the Provisional Government brutally suppressed the opposition of their former comrades.³⁵

Despite the tumultuous background, the Constitution of the Irish Free State was an incredibly liberal document - in the mode of the Constitution of the Weimar Republic.³⁶ Although the British authorities had regularly employed martial law and special trial processes and the Provisional Government had resorted to execution by executive act, Article 70 of the Constitution of the Irish Free State expressly provided that "extraordinary courts shall not be established".37 Although the adoption of such liberal principles may have been commendable, it left the Constitution of the Irish Free State incapable of resisting the continuing threat posed by republican paramilitaries in the 1920s and 1930s. On July 10, 1927, Kevin O'Higgins, Vice-President, Minister for Justice and lead negotiator for the Irish Free State delegation at the Imperial Conference of 1926, was assassinated by the IRA on his way to church.³⁸ The government response was to introduce the *Public Safety Act* 1927 which provided for non-jury trial. The fact that this provision clearly contravened Article 70 of the Constitution was resolved by section 3 of the Act which provided that any provisions of the Act which were repugnant to the Constitution should operate as amendments to that Constitution – a quite extraordinary measure! The special court anticipated by the *Public Safety Act* 1927 was never actually established. However, it provided a template for the later non-jury court, which was a more express amendment to the Constitution of the Irish Free State – Article 2A. This emergency court operated from 1931 through to 1937.39 These models of non-jury trial were influential upon the drafting of the later Offences Against the State Act 1939.

In 1937, the Irish state adopted a new constitution by plebiscite. This constitution, *Bunreacht na hÉireann*, the Constitution of Ireland, expunged all references to the British Crown – more significantly, for our purposes, it created a new constitutional regime for trial by jury. Article 38.5 provides that a criminal trial shall be conducted before a jury; Article 38.2 allows that minor offences may be tried by courts of summary jurisdiction (which is understood to mean a court without a jury). Unlike Article 70 of the *Constitution of the Irish Free State*, Article 38.3 specifically allows for the creation of special courts,

³⁴ Tom Garvin, 1922: the Birth of Irish Democracy (St. Martin's Press 1966), 94, citing Kevin O'Higgins.

³⁵ Davis (n.31), 34-39.

³⁶ Leo Kohn, The Constitution of the Irish Free State (Allen & Unwin 1932).

³⁷ Constitution of the Irish Free State, Art. 70 http://www.ucc.ie/celt/online/E900003-004/ accessed November 5, 2012.

³⁸ Davis (n.31), 39.

³⁹ ibid.

when the "ordinary courts are inadequate to secure the effective administration of justice". 40 With the demise of the that *Constitution*, the military tribunal created by Article 2A ceased to function, but, despite constitutional authorisation for the creation of special courts by Article 38.5, and to the consternation of the civil servants in the Ministry for Justice, no legislation was brought forward to provide for the creation of such courts until 1939.41 The immediate impetus for legislative action was both local and geo-political. The IRA engaged in a bombing campaign on mainland Britain in the summer of 1939.42 They purported to exercise the foreign policy of the state and declared war on Britain in the name of the state.⁴³ employing the old adage that "my enemy's enemy is my friend", the IRA were seeking support for their campaign from Nazi Germany.⁴⁴ The Irish government feared that such actions would imperil their desired policy of neutrality in any European war and would provoke Despite a lengthy history of anti-terrorism a British invasion. measures, the Irish government legislated in haste – the result was the Offences Against the State Act 1939 which, in essence, gave legislative effect to the constitutional provisions contained in Article 38.5.

Part V of the Offences Against the State Act 1939 provides for the creation of Special Criminal Courts - recycling a title which had first been employed in the Public Safety Act 1927. Under the terms of the Act, the government must issue a proclamation, declaring the ordinary courts to be inadequate, in order to bring Part V into effect.⁴⁵ Such a proclamation was made in 1939 and continued in force even after the end of the "emergency" associated with World War II.46 In fact, when the Special Criminal Court was re-constituted in 1961 in response to a cross-border campaign of violence by the IRA, the government simply announced that the Special Criminal Court was to start hearing cases again - there was no need for another proclamation.⁴⁷ A further proclamation was issued in 1972 when the court was re-established to deal with cases emanating from the "troubles" in Northern Ireland.⁴⁸ The court continues to function until the present day, despite the Northern Irish peace process and a significant reduction in terrorist violence on the island of Ireland.

⁴⁰ Bunreacht na hÉireann (Constitution of Ireland), Art. 38.3.

⁴¹ Davis (n.31), 64.

⁴² Tim Pat Coogan, De Valera: Long Fellow, Long Shadow (Random House 1993), p.523.

⁴³ Davis (n.31), 63.

⁴⁴ Joseph T. Carroll, *Ireland in the War Years* (David and Charles 1975), p.61.

⁴⁵ Offences Against the State Act 1939, s.35.

⁴⁶ Davis (n.31), 71-96.

John Bowyer Bell, The Secret Army: the IRA (Transaction Publisher 1997), p.333.

⁴⁸ Davis (n.31), 131-132.

The Special Criminal Court is a distinct and separate court in the Irish criminal justice system – it operates when the ordinary courts are deemed inadequate. To be appointed to sit on the Special Criminal Court one must be a "judge of the High Court or the Circuit Court, or a justice of the District Court, or a barrister of not less than seven years standing, or a solicitor of not less than seven years standing, or an officer of the Defence Forces not below the rank of commandant".49 The inclusion of members of the Defence Forces can be traced back to the Public Safety Act 1927. When the Bill was being drafted at least two members of the Supreme Court let the government know that they would resign if asked to sit on a special court. As a result, the Bill was redrafted to exclude members of the judiciary from sitting on this special court: they were replaced by members of the Defence Forces.⁵⁰ In fact, members of the defence forces have not sat on the Special Criminal Court since its reintroduction in 1972, and there have been calls for the amendment of section 39 to make the legislation reflect the practice.⁵¹

Appointment to and removal from the Special Criminal Court is at the will of the government.⁵² These provisions give rise to concerns about the independence of the court, particularly when combined with the potential for members of the defence forces and officers of the executive to sit upon the court. However, in *Eccles v. Ireland*, the Supreme Court held that the executive could not interfere with the judicial functioning of the Special Criminal Court. It stated that, "whilst ... the Special Criminal Court does not attract the express guarantees of judicial independence contained in Article 35, it does have, derived from the Constitution, a guarantee of independence in the carrying out of its function".⁵³

The justification for introducing the Special Criminal Court has always rested upon the threat posed by subversive organisations. In 1939, the Minister for Justice, Patrick Routledge, stated clearly that the cases envisaged to be dealt with by the Special Criminal Court were "offences related to armed intimidation and to violent means". Despite this, the Special Criminal Court was augmented by a military tribunal which was used throughout the "emergency" (1939-1946) for the trial of black market cases. Between 1939 and 1946, there were 42 prosecutions for "security offences" before the Special Criminal Court, resulting in 34 convictions. During the same period, there were 200 prosecutions for breaches of "various orders concerned

⁴⁹ Offences Against the State Act 1939, s.39(3).

⁵⁰ Donal O'Sullivan, The Irish Free State and its Senate (Arno Press 1972) p.261.

⁵¹ Hederman Report (n.16), 54; pp.231-32.

⁵² Offences Against the State Act 1939, s.39(2).

⁵³ Eccles v. Ireland [1985] I.R. 545, 549.

⁵⁴ Dáil Éireann, Parliamentary Debates, March 2, 1939, vol. 74, col. 1290.

with the maintenance of essential supplies and services" and offences relating to the unlawful trade in gold, currency, watches and similar items.⁵⁵ Throughout this period, the military tribunal operated separately from the Special Criminal Court – although it was staffed by the same personnel.⁵⁶

The Special Criminal Court is bound by the ordinary rules of evidence pertaining to the High Court;⁵⁷ the military tribunal was not. Thus the executive felt the need to augment the Special Criminal Court with a military tribunal because it was these rules of evidence which appeared problematic to government. The military tribunal has been termed a "curious and sinister" court.⁵⁸ It "made huge inroads on the ordinary laws of evidence: unsigned statements by persons who were not called to give evidence in court were admissible; and the court, if it considered it 'proper that it should not be bound by any rule of evidence, whether statutory or at common law', was not to be bound by any such rule".⁵⁹

There are three points of interest here: firstly, the Special Criminal Court was being used in non-subversive cases within years of its initial establishment; secondly, the ordinary courts were deemed inadequate to deal with black market offences because those offences lacked popular support; and, thirdly, the Special Criminal Court's use was augmented by a military tribunal because that tribunal was unbound by the ordinary rules of evidence. Two of these points are indicative of a normalisation of an emergency power – to which we will return in relation to the New Zealand experience. The latter issue indicates that the absence of the jury is not sufficient for untrammelled executive power.

The German political philosopher Carl Schmitt has argued that the "state of exception" (e.g. a state of emergency) and the manner of its disposal cannot be specified in advance – the very nature of the exception is that it is unpredictable and therefore it is futile for a constitutional order to attempt to prescribe a response in advance. At most, the constitution should stipulate who should deal with any emergencies that arise.⁶⁰ Article 28.3.3⁰ is the very essence of

⁵⁵ Dáil Éireann, Parliamentary Debates, October 23, 1946, vol. 103, Table I, cols. 163-64.

⁵⁶ Gerard Hogan, Gerry Whyte, *J.M. Kelly: the Irish Constitution* (Lexis Nexis Butterworths 2003), para. 6.5.351.

⁵⁷ Offences Against the State Act 1939, s.41(4).

⁵⁸ J.M. Kelly, Fundamental Rights in the Irish law and Constitution (Allen Figgis & Co. 1961), p.274.

⁵⁹ Hogan, Whyte (n.56), para. 6.5.352.

⁶⁰ David Dyzenhaus, Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar (Clarendon Press 1997).

Schmitt's "state of exception",⁶¹ providing, as it does, that "nothing in this Constitution shall be invoked to invalidate any law enacted by the *Oireachtas* which is expressed to be for the purpose of securing the public safety and preservation of the state in time of war or armed rebellion..."⁶² The Special Criminal Court was constitutionally anticipated but also constitutionally restricted. As an emergency power enacted by the *Oireachtas* during a time of war – although Ireland was not an actual party to that war – the military tribunal was immune from constitutional review and therefore, from a positive law perspective, this curious and sinister tribunal was legal.

When the Special Criminal Court was re-established in 1972, the *Taoiseach*, Jack Lynch, overtly linked the necessity for special courts with the political violence emanating from Northern Ireland:

"we want to make sure that we can continue to control any subversive activities here ... But these activities were, of course, related to the situation in the North of Ireland and as soon as that situation will have eased ... then there wouldn't seem to be any need for the continuation of the special courts and therefore we would have to look at the situation again." 63

Ireland remained in a legal state of emergency from 1939 to 1976,⁶⁴ with a new state of emergency being declared in 1976 which continued until 1995.⁶⁵ The Special Criminal Court established in 1972 continued despite the end of the official state of emergency in 1995. Moreover, despite the unequivocal association of the court with subversive cases at the time of its establishment, it has been used periodically in non-subversive cases – and, since 1996, used mainly in the fight against organised crime.⁶⁶ Thus an exceptional power has become part of the regular criminal justice system – and the ordinary courts are deemed inadequate in "gang-related" cases. This has been characterised by a broader shift in Irish criminal justice from due process to crime control over the past decade.⁶⁷ Organised and gang-related crime in Ireland is "now being handled as a security issue, in a way which undeniably compares to the handling of paramilitary activity

⁶¹ Fergal Davis, Christopher Thornhill, "Article 28.3.3⁰: Terrorism, Democracy, Supra-Legality and the 'State of Emergency' in the Irish Constitution', in Eoin Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects* (forthcoming, Bloomsbury Professional 2012)

http://ssrn.com/abstract=2092294> accessed November 5, 2012.

⁶² Bunreacht na hÉireann (Constitution of Ireland), Art. 28.3.3°.

⁶³ Davis (n.31), 149.

⁶⁴ Hederman Report (n.16), 58, fn.111.

⁶⁵ ibid., 24.

⁶⁶ Conway, Mulqueen (n.20), 106-07.

⁶⁷ Liz Campbell, "The *Criminal Justice Act* 2007 – a Theoretical Perspective" (2007) 17(3) Irish Criminal Law Journal 8.

in the 1970s and 80s".⁶⁸ This overlap between terrorist and gang-related cases will be explored in further detail in relation to New Zealand.

Despite the "peace-dividend" and the resulting reduction in political violence in Ireland, the post-emergency period (from 1995 to the present day) has seen the introduction of a series of crime control measures including, for example: the Criminal Justice (Drug Trafficking) Act 1996; the Bail Act 1997; the Proceeds of Crime Acts 1996 and 2005; and the Criminal Justice Act 2006.69 The murder of the journalist Veronica Guerin was quickly portrayed as an attack on the state. Organised criminals became the heirs to the terrorists, and gang-land violence is conflated with the threat of organised crime and the threat of the IRA. This period was characterised by a hollowing out of due process rights as "extraordinary laws" were normalized:70 notably, for the purposes of this article, this climate has enabled successive Irish governments to employ the Special Criminal Court in the organized crime context in a relatively unthinking manner. The most striking aspect of the normalization of that "special" non-jury court is that it occurred without any significant debate or reflection.⁷¹ It was too convenient to portray organised crime as the "new terrorism," thereby justifying the extension of these exceptional powers creating an all-enveloping "security blanket".72

One of the most significant problems with the operation of the Special Criminal Court in non-subversive cases is the practical impossibility of reviewing a certificate by the Director of Public Prosecutions (DPP) to the effect that the ordinary courts are inadequate.⁷³ In a series of cases, the Irish courts have reached the conclusion that the decision of the DPP is not amenable to review⁷⁴ on the basis that the Irish parliament left the issue of determining the inadequacy of the courts to the DPP.⁷⁵ The Supreme Court has held that "if ... it can be demonstrated that he [the DPP] reaches his decision *mala fides* or influenced by an improper motive or improper policy then his decision would be reviewable by a court".⁷⁶ Problematically, the DPP does not give reasons for his decisions, so it

⁶⁸ Conway, Mulqueen (n.20), 112.

⁶⁹ Liz Campbell, "The Culture of Crime Control in Ireland: Theorising Recent Developments in Criminal Justice" (2008) 1 Web Journal of Current Legal Issues http://webjcli.ncl.ac.uk/2008/issue1/pdf/campbell1.pdf accessed November 5, 2012.
⁷⁰ Shane Kilcommins, Barry Vaughan, "Reconfiguring State-Accused Relations in Ireland" (2006) Irish Jurist 90.

⁷¹ Davis (n.31), 192.

⁷² Conway, Mulqueen (n.20).

⁷³ Offences Against the State Act 1939, s.46.

⁷⁴ In re the Criminal Law (Jurisdiction) Bill 1975 [1977] I.R. 129; Savage and McOwen v. D.P.P. [1982] 1 I.L.R.M. 385; and O'Reilly and Judge v. D.P.P. [1984] I.L.R.M. 224.

⁷⁵ O'Reilly and Judge v. D.P.P. [1984] I.L.R.M. 224, 229.

⁷⁶ The State (McCormack) v. the DPP [1987] I.L.R.M. 225, 232.

is impossible to determine if they have been influenced by an improper motive. The United Nations Human Rights Committee (UNHRC) has criticised this state of affairs. In Kavanagh v. Ireland the committee held that the failure of the DPP to give reasons violates Article 26 of the International Covenant on Civil and Political Rights - which guarantees equality before the law. The decision in Kavanagh rests on the fact that the failure of the DPP to give reasons for a decision to issue a certificate restricts judicial review "to the most exceptional and virtually undemonstrable circumstances".77 The inability to secure effective judicial review of the decision facilitates the overlap of subversive and non-subversive cases by preventing scrutiny of the basis for the decision to treat nonsubversive, gang-related, cases as if they are analogous to the former terrorist threat associated with the IRA and the Northern Irish troubles. In direct contrast with this unwillingness to give reasons in the context of the Special Criminal Court, James Hamilton, the Irish Director of Public Prosecutions for 12 years to 2011, demonstrated considerable enthusiasm for giving "reasons in relation to decisions not to prosecute in cases involving death". 78 Giving reasons for non-prosecution renders the decision susceptible to judicial review. Despite this shift in policy and the criticism of the UNHRC, the Office of the DPP in Ireland has confirmed that they continue not to give reasons for the decision to certify the ordinary courts inadequate under section 46 of the Offences Against the State Act 1939.79

B. Trial by jury in New Zealand

"Jury trial in New Zealand dates back to the earliest years of colonisation and initially represented an uninterrupted transmission of the English legal heritage". 80 Captain William Hobson, on behalf of the British Empire, and the independent Chiefs of New Zealand, on behalf of the Māori, signed the *Treaty of Waitangi* on February 6, 1840.81 On May 21, 1840, Captain Hobson declared

⁷⁷ Kavanagh v. Ireland, U.N. Doc. CCPR/C/71/D/819/1998 (April 26, 2001), para. 10.2.
78 James Hamilton, Director of Public Prosecutions, "The Prosecutor and the Victim" (Centre for Criminal Justice and Human Rights 4th Annual Conference, Cork, June 11, 2010 http://www.dppireland.ie/filestore/documents/THE-PROSECUTOR AND THE VICTIM 110610.pdf accessed November 5, 2012.

⁷⁹ "Further to my earlier e-mail and our subsequent telephone conversation, I would like to confirm that the Director does not provide reasons when issuing a certificate to send a case for trial before the Special Criminal Court. We have no difficulty in your attributing this confirmation to this Office in your book if you so wish." Email from the Office of the Director of Public Prosecutions, Ireland, to the author (April 2011).

⁸⁰ Cameron, Potter, Young (n.15), 103.

⁸¹ The Treaty of Waitangi http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text accessed November 5, 2012.

British sovereignty over all of New Zealand. Almost immediately, jury trial was established: the Supreme Court Ordinance 1841 provided for a criminal jury of twelve men for all cases tried on indictment. It should be acknowledged that, over time, the criminal jurisdiction of the magistrates' courts was expanded, which limited access to trial by jury. For example, section 4 of the Summary Jurisdiction Act 1952 limited trial by jury to those offences with a maximum permissible sentence of three months' imprisonment or more. In addition, section 43 of the Summary Offences Act 1981 excluded the right to trial by iury for the offence of common assault - despite the fact that that offence attracted a sentence of up to six months' imprisonment. As a result, as recently as the 1970s, the number of jury trials was increasing, but the proportion of defendants opting for jury trials was decreasing.82 The right to trial by jury is guaranteed by section 24 of the New Zealand Bill of Rights Act 1990. A recent proposal to amend that Act to limit trial by jury to offences attracting a sentence of three years' imprisonment, rather than the current three months, was ultimately not included in the Criminal Procedure Act 2011. As the Attorney-General noted, the proposal would have been only the second amendment to the Bill of Rights Act and, unlike the previous successful amendment, would have had the effect of limiting rather than expanding a right.⁸³ It is fair to conclude that jury trial is an embedded feature of the New Zealand criminal justice system: it has been described as "central in New Zealand criminal law".84

As was noted previously, New Zealand has a history of antiterrorism legislation. The New Zealand Security Service was established in 1956 following pressure from the British government, and was modelled on the British MI5.85 The New Zealand Security and Intelligence Service Act 1969 renamed the organisation and placed it on a statutory footing. The organisation was specifically tasked with protecting New Zealand from espionage, sabotage and subversion; by 1977, the definition of security was amended to take account of international terrorism.86 The Crimes Act 1961 "was enacted ... not only to cover generic aspects of criminal activity but also to mindfully target possible terrorist scenarios including sabotage, seditious offences, arson, and wilful damage (plus damage or attempted

⁸² Cameron, Potter, Young (n.15), 106.

Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the proposed amendment to s.24(e) of the New Zealand Bill of Rights Act 1990 in the Criminal Procedure (Reform and Modernisation) Bill (November 15, 2010), para. 4 http://bit.ly/NZParl-AG-Report-NZBORA-CrimProcRefBill-2010 accessed on November 5, 2012.

⁸⁴ Siemer v. Solicitor-General [2010] NZSC 54, [2010] 3 NZLR 767, [21].

⁸⁵ B.K. Greener-Barcham, "Before September: a History of Counter-Terrorism in New Zealand" (2010) 37(3) Australian Journal of Political Science 509, 510.

^{86 &}lt; http://www.nzsis.govt.nz/about/history.html > accessed November 5, 2012.

damage by fire or explosives)".87 It can be surmised that much of New Zealand's anti-terrorism legislation was primarily a response to international conventions to which New Zealand was a signatory and specific incidents of international terrorism.⁸⁸ Whereas Irish antiterrorism was forged in the heat of domestic terrorist-induced crises and insurrection, New Zealand was legislating in anticipation of international events being replicated at home - it had, as a result, a more outward looking stance. In 1985, New Zealand suffered, arguably, its first terrorist attack, when the Greenpeace flagship, the Rainbow Warrior, was sunk by French military agents while it was docked in the port of Auckland.⁸⁹ This incident was followed in 1987 by the attempted hijacking of an Air New Zealand aeroplane in Fiji.90 The legislative response to these events came in the form of the International Terrorism (Emergency Powers) Act 1987 - this Act is said to have been modelled on the United Kingdom's Prevention of Terrorism (Temporary Provisions) Act 1984.91 It is predominantly designed to allow the authorities to respond to an emergency by, for example, requisitioning property, 92 and to intercept private communications in an area where an emergency is occurring.93

It is clear, therefore, that New Zealand's anti-terror laws have generally been influenced by events overseas, and that legislative responses to terror attacks in New Zealand or acts of terror directed at New Zealand targets abroad have been influenced by international It is unsurprising, therefore, that in the period since experience. September 11, 2001, New Zealand's anti-terrorism law has undergone a change: "whereas New Zealand's counter-terrorist measures were once configured to the containment and control of international terrorist 'spill overs' on to New Zealand soil, they are now geared more towards the potential for a domestically focused terrorist attack as well".94 This shift in focus can be seen in the legislative restrictions which have been placed upon the right to trial by jury in New Zealand and by the utilisation of those new powers in the socalled "terror-raid trials".

The New Zealand *Crimes Act* 1961 was amended by section 4(1) of the *Crimes Amendment Act* (No. 2) 2008 to allow for trial without jury in two circumstances. The new section 361D allows for non-jury trial

⁸⁷ Greener-Barcham (n.85), 510.

⁸⁸ *ibid.*, 511.

⁸⁹ Roger S. Clark, "State Terrorism: Some Lessons from the Sinking of the Rainbow Warrior" (1988-89) 20 Rutgers Law Journal 393.

⁹⁰ Greener-Barcham (n.85), 516.

⁹¹ ibid., 517.

⁹² International Terrorism (Emergency Powers) Act 1987, s.10(2)(f).

⁹³ *ibid.*, s.10(3).

⁹⁴ Greener-Barcham (n.85), 521.

where the trial is likely to be long and complex. For this section to apply an accused must face less than 14 years' imprisonment 95 and the trial must be likely to last longer than 20 days. 96 The trial judge must be satisfied that "in the circumstances of the case, the accused person's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively".97 sense, section 361D is similar to the Irish Offences Against the State Act 1939, in that both are designed to remove the right to trial by jury when jury trial is deemed inadequate to function effectively. As with the Irish legislation, there is no direct mention of terrorism in the legislation – although the title of the Irish legislation does imply a national security context. However, whereas in Ireland the introduction of the Special Criminal Court and the legislation providing for it has always been justified on the basis of a terrorist or subversive threat, in New Zealand the justification relied on the jury's inability to function when faced with complex evidence or with a trial that is likely The removal of trial by jury in circumstances of complex trials is not novel, and this justification has, for example, been employed in the context of serious fraud trials in England and Wales.98

In contrast with New Zealand, Ireland has demonstrated some commitment to maintaining the jury in complex trials. A proposal to create specialist juries has recently re-emerged in Ireland the argument being that if regular juries are incapable of comprehending certain evidence an alteration to the jury system is required.⁹⁹ Thus, despite using non-jury trials in terrorist and gang-related cases, Ireland is willing to consider redesigning the jury - rather than scrapping it – to resolve other potential weaknesses in the jury system. Specialist juries and the removal of trial by jury through measures like section 361D can be presented as alternative attempts at balancing the right to trial by jury against the right to a fair trial. In some circumstances, a jury may not be in a position to interpret the information presented to them, and, as such, trial by jury would be unfair. Doubts about the ability of laypersons to understand complicated legal proceedings have been suggested as grounds for restricting trial by jury in numerous jurisdictions, and attempts have been made to assess juror comprehension. In 2010, Cheryl Thomas asked jurors to

⁹⁵ New Zealand Crimes Act 1961, s.361D(1)(a).

⁹⁶ *ibid.*, s.361D(3)(a).

⁹⁷ *ibid.*, s.361D(3)(b).

⁹⁸ David Corker, "Trying Fraud Cases Without Juries" [2002] Crim.L.R. 283.

⁹⁹ See James Hamilton, Director of Public Prosecutions, "Prosecuting Corruption in Ireland" (Burren Law School, May 1, 2010) < http://www.dppireland.ie/filestore/documents/Director's Speech at Burren Law School - 1 May 2010.pdf accessed November 5, 2012; Niamh Howlin, "Special Juries: A Solution to the Expert Witness?" (2004) 12 Irish Student Law Review, 19-47.

identify the two questions the judge had directed them to answer. Only 31 per cent of jurors accurately identified both questions. 100 In mitigation, Thomas noted that 20 of the 21 juries examined contained at least one juror who correctly identified the questions. 101 More alarmingly, when 277 New South Wales jurors from 25 real cases were asked: "what was the verdict in this case?", the vast majority were mistaken as to the outcome of the case they had themselves determined. In only six cases did all participating jurors report the same verdict. 102 This demonstrates a significant problem with juror understanding of legal proceedings. Juror comprehension of complicated scientific evidence has also been seen as problematic. 103 There is evidence that jurors believe that they have understood the evidence presented, 104 but it remains difficult to assess their actual level of comprehension.¹⁰⁵ If juries cannot understand the proceedings and the complicated evidence presented in court, then they cannot be Such arguments apply to all cases, including cases of relied upon. suspected terrorism. The 2008 amendment of the Crimes Act was based upon a 2001 New Zealand Law Commission report which advocated the removal of jury trial in lengthy and complex cases. 106 That report specifically referred to the use of single judge, non-jury courts in Northern Ireland (Diplock Courts) but did not mention the Republic of Ireland's Special Criminal Court model. 107

The second relevant provision of the *Crimes Act* 1961, as amended, is section 361E which allows the prosecutor to apply for a non-jury trial where there is a risk of jury tampering. The judge may only make such an order if:

"satisfied that there are reasonable grounds to believe—

(a) that intimidation of any person or persons who may be selected as a juror or jurors has occurred, is occurring, or may occur; and

¹⁰⁰ Cheryl Thomas, Are Juries Fair? (Ministry of Justice Research Series 1/10, February 2010), 36.

¹⁰¹ *ibid.*, 37.

¹⁰² Judy Cashmore, Lily Trimboli, "Child Sexual Assault Trials: a Survey of juror perception" (N.S.W. Bureau of Crime Statistics and Research Crime and Justice Bulletin no. 102, September 2006), 12. http://lawlink.nsw.gov.au/lawlink/bocsar/ll-bocsar.nsf/vwFiles/CJB102.pdf/\$file/CJB102.pdfhttp://lawlink.nsw.gov.au/lawlink/bocsar/ll-bocsar.nsf/vwFiles/CJB102.pdf/\$file/CJB102.pdfhttp://lawlink.nsw.gov.au/lawlink/bocsar/ll-bocsar.nsf/vwFiles/CJB102.pdf/\$file/CJB102.pdf>

¹⁰³ Robert D. Myers, Ronald S. Reinstein, Gordon M. Griller, "Complex Scientific Evidence and the Jury" (1999) 83(3) Judicature 150.

¹⁰⁴ Matthews, Hancock, Briggs (n.8), 72-74.

¹⁰⁵ House of Commons Science and Technology Committee, Forensic Science on Trial (HC 2004-05, 96-I), 72-74.

New Zealand Law Commission, *Juries in Criminal Trials*, (N.Z.L.C. R.69, 2001).ibid., para. 114.

(b) that the effects of that intimidation can be avoided effectively only by making an order."¹⁰⁸

While the issue of jury intimidation was raised in the 2001 New Zealand Law Commission report, it was not relied on as a justification for removing the right to trial by jury, but was rather discussed in the context of jury vetting. ¹⁰⁹ In fact, the evidence of jury intimidation in New Zealand was not forthcoming during the Parliamentary debates on the proposals. At the first reading of the *Criminal Procedure Bill*, the Associate Minister simply asserted that judge-only trial was necessary because "from time to time there has been an issue in gang-related cases". ¹¹⁰ Some Members of Parliament did refer to cases where an individual had "got away with murder" due to intimidation, but no firm evidence was advanced to support these claims. The closest example was when Judith Collins M.P., stated that:

"We understand that there is a concern over gang-related crime. I can recall at least one crime that occurred in Taranaki where a person literally got away with murder because of intimidation of witnesses and a jury. Of course, that one instance does not mean to say that this happens all the time, so therefore we need to tread very, very carefully with that issue."

Of course, the inability to sustain justifications based upon jury intimidation is not unique to New Zealand. Twining criticised the Diplock Commission in Northern Ireland for adducing "very little evidence, statistical or otherwise ... of widespread intimidation of jurors". In the Republic of Ireland, Desmond O'Malley, the Minister of Justice responsible for re-introducing the Special Criminal Court in 1972 stated: "I am precluded from referring to individual cases in which persons have been acquitted ... The possible threat of retaliation assumes new proportions when court-houses are picketed by persons in a barely veiled atmosphere of intimidation". 113

The issue of gangs in New Zealand has been explored elsewhere.¹¹⁴ It should be acknowledged that the existence of these gangs is not

¹⁰⁸ New Zealand Crimes Act 1961, s.361E(2).

¹⁰⁹ New Zealand Law Commission, *Juries in Criminal Trials*, (n.106), paras 237-243.

¹¹⁰ The Hon. Rick Barker M.P., N.Z. Parliamentary Debates (Hansard) June 29, 2004, vol. 618, 14212.

¹¹¹ ibid., 14223.

¹¹² W.L. Twining, "Emergency Powers and Criminal Process: the Diplock Report" [1973] Criminal Law Review 406, 413.

¹¹³ Dáil Éireann, Parliamentary Debates, June 15, 1972, vol. 261, col. 1766.

¹¹⁴ N.Z. Parliamentary Library, *Young People and Gangs in New Zealand* (Research Paper 09/02, April 3, 2009),http://bit.ly/NZParl-Young-People-Gangs-2009 accessed November 5, 2012.

new, 115 and has given rise to a classic moral panic. 116 The ability of the iury system to guarantee a fair trial for "outsiders" is often contentious.¹¹⁷ It might be argued that some defendants' right to a fair trial trumps their right to trial by jury and that, in such cases, we ought to suspend trial by jury to ensure a fair trial. However, the predominant justification for section 361E was not based on such analysis, but rather on the belief that gangs pose a peculiar risk of intimidation. In New Zealand, as in Ireland, the twin issues of gangs and terrorism converged in the so-called "terror-raid trials". 118 In this case, there was a protracted, and ultimately unsuccessful, attempt to employ the non-jury trial procedures laid down in the Crimes Act 1961 (as amended). "In bush, on Tuhoe-owned lands in the Urewera Ranges, it is alleged that [individuals] participated between November 2006 and October 2007 in military-style exercises using firearms, live ammunition, and Molotov cocktails". 119 Police investigations initially treated these activities as suspected terrorism.¹²⁰ On October 17, 2007, a series of early morning raids were conducted across New Zealand resulting in the arrests of 18 Initially, the consent of the Solicitor-General to bring charges under the Terrorism Suppression Act 2000 was sought, but this Ultimately, the individuals were charged with was not granted. participation in an organised criminal group contrary to section 98A of the Crimes Act 1961 and offences under the Arms Act 1983.122 There was a blurring of the boundary between a criminal gang and a terrorist gang in the case. There were a number of legal proceedings relating to these trials. Initially, the courts held that the criteria for

¹¹⁵ Report of the Special Committee on Moral Delinquency in Children and Adolescents (Mazengarb Report) (N.Z. Government Printer 1954), Pt III, "Narrative", http://bit.ly/NZ-Mazengarb-Report-1954> accessed November 5, 2012.

¹¹⁶ Damian C.A. Collins, Robin A. Kearns, "Under Curfew and Under Siege? Legal Geographies of Young People" (2001) 32 Geoforum 389, 390.

¹¹⁷ Jill Hunter, "A Jury of Whose Peers? The Cultural Politics of Juries in Australia" (2005) 28(1) UNSW Law Journal 318; and, in a different context, Theodore Eisenberg and Geoffrey P. Miller "Do Juries Add Value? Evidence from an Empirical Study of Jury Trial Waiver Clauses in Large Corporate Contracts" (2007) 4(3) Journal of Empirical Legal Studies 539, 547.

¹¹⁸ "Urewera 'terror raid' trial may not start till 2012" *3 News* (New Zealand, May 10, 2011) http://bit.lv/3NewsNZ-UreweraTerrorTrial accessed November 5, 2012.

¹¹⁹ Hamed v. The Queen [2011] NZSC 101, [2]. For an in-depth casenote on Hamed, see Paul Kingsley Clark, "Exclusion of Evidence Obtained in Violation of Fundamental Rights in New Zealand & Canada" [2011] J.C.C.L. 345.

¹²⁰ Hamed (n.119), [92].

¹²¹ David Small, "Balancing national security and personal freedom in a low-risk society: the case of New Zealand" (Research Committee on Sociology of Law Annual Conference: Law and Justice in the Risk Society, Milan and Como, Italy, July 9-12, 2008) http://bit.ly/D-Small-2008 accessed November 5, 2012.

¹²² Bailey v. The Queen [2011] NZCA 480, [1].

suspension of trial by jury were met, and that a "likelihood that potential jurors will not be able to perform their duties effectively"123 However, there was a change in circumstances. 125 It is safe to assume that the change was related to the withdrawal of the charges against 11 of the 15 suspects. 126 Thereafter, all parties agreed that the criteria set out in section 361D of the Crimes Act were no longer satisfied,127 and a date for an ordinary trial by jury was set. The remaining four defendants, Tame Iti, Te Rangikaiwhiria Kemara, Urs Signer and Emily Bailey, were convicted of various charges under the Arms Act 1983. They were not convicted on charges of participating in an organised criminal group under section 98A of the Crimes Act 1961. On October 29, 2012, the New Zealand Court of Appeal upheld sentences of two years' imprisonment for Iti and Kemara. The Court of Appeal also upheld the convictions of Signer and Bailey, who had served seven months of their nine month home detention sentences. 128 The circumstances surrounding these police investigations is the subject of a review by the Independent Police Conduct Authority. 129

The provisions adopted in New Zealand are, in form, substantially similar to those adopted in Ireland. Neither statute formally requires a subversive element in order to invoke the non-jury mechanism. While in Ireland the introduction of the Special Criminal Court has always been justified on the basis of the terrorist threat, the measure has gradually come to be used predominantly in gang-related offences. On the other hand in New Zealand the justifications for introducing the measures did not rely on any supposed terror threat and referred to the risk of gang-related jury intimidation. The attempted use of the non-jury power in the so-called "terror-raid trials" was justified on the basis of an alleged terrorist plot which subsequently morphed into an ordinary trial. The pliability of the distinction between terrorism and gang violence in both states is notable. In contrast to the unreviewable decision of the Irish DPP

¹²³ New Zealand Crimes Act 1961, s. 361D(3)(b).

¹²⁴ Signer v. The Queen [2011] NZSC 109, [1], [4].

¹²⁵ *ibid.*, [1].

¹²⁶ Ian Steward, "Urewera Terror Raid Case a 'House of Cards" *Stuff.co.nz* (Wellington, September 7, 2011) http://bit.ly/StuffNZ-Steward-Urewera-Trial accessed November 5, 2012.

¹²⁷ Signer (n.124), [1].

¹²⁸ Iti v. The Queen [2012] NZCA 492.

¹²⁹ On May 24, 2012, the Independent Police Conduct Authority indicated that their report into the police investigation was substantially complete, but that, in the interests of natural justice, they were awaiting the police response. On August 9, 2012, the authority confirmed in correspondence with the author that this remained the case. At the time of writing, the report remains unpublished. See < http://www.ipca.govt.nz/Site/media/2012/2012-May-24-Op-8.aspx accessed November 5, 2012.

as to the inadequacy of the ordinary courts, however, it is interesting to note that, in New Zealand, section 361D(2) vests the power to determine whether or not to apply section 361D(3)(b) in the court and not in the prosecutor – and this decision was reviewed in the "terror-raid trials". The determination of what "likelihood" means, in the context of section 361D(3)(b) has been the subject of judicial debate: Winkelmann J. in the High Court held that it required there to be an "appreciable risk"; whereas the Court of Appeal felt that substituting one synonym for another was unhelpful. The Supreme Court of New Zealand concluded that section 361D "depends on a balance between different objectives of public interest (the right to jury trial and the right to a fair trial). ... It is preferable that any further consideration of the approach required should be undertaken by this court ... in application in a live controversy". 132

III. DISCUSSION

This process of undermining jury trial must be set within the context of a prolonged and sustained attack on trial by jury internationally. Historically seen as the "bulwark of liberty"¹³³ and the "lamp that shows that freedom lives", ¹³⁴ more recently it has been dismissed as an ineffective method of administering justice. In 1991, Darbyshire poured scorn on those who heap "unquestioning praise on the jury" and "deceive themselves and the public into thinking that jury trial is the 'centrepiece' of the criminal justice system". ¹³⁵ A decade later, Lord Justice Auld was, at best, unenthusiastic about juries in criminal trials. ¹³⁶ The issue of jury bias – particularly juror racism – has been examined by the domestic courts ¹³⁷ and the European Court of Human Rights. ¹³⁸ Finally, by 2011, concerns were emerging about the ability of juries to function in an age of ubiquitous access to the internet and social networks. ¹³⁹

¹³⁰ Signer (n.124), [2].

¹³¹ *ibid.*, [4]-[5].

¹³² *ibid.*, [9].

¹³³ Cornish (n.2), 126.

¹³⁴ Devlin (n.3), 164.

¹³⁵ Darbyshire (n.1), 751.

¹³⁶ Lord Justice Robin Auld, A Review of the Criminal Courts of England and Wales (2001), Ch. 5. http://bit.ly/TNA-Auld-Review-2001 accessed November 5, 2012.

James Morton, "Opinion: Inside the Jury Room" (2004) 68 Journal of Criminal Law 1.
 Remli v. France (1996) 22 European Human Rights Reporter 253; Gregory v. U.K.
 (1997) 25 E.H.R.R. 577; and Sander v. U.K. (2000) 31 E.H.R.R. 1003.

¹³⁹ Theodora Dallas was found guilty of contempt of court for conducting her own internet research while serving on a jury in a criminal trial. She was sentenced to six months in prison. In the same year, another juror, Joanne Fraill, was convicted of contempt after contacting the defendant in her case via the social networking site, Facebook. See: Owen Bowcott, "Juror Jailed Over Online Research", *The Guardian*

The pattern of a sustained undermining of the jury as an institution resulting in legislative amendment is not unique to Ireland and New Zealand. In England, Wales and Northern Ireland, for example, Part 7 of the *Criminal Justice Act* 2003 provides for trials on indictment without a jury. Initially the non-jury provisions of that Act went unused. Nevertheless, populist rhetoric was often employed against the institution of the jury. For example, in 2004 the then Prime Minister, Tony Blair, affirmed his commitment to non-jury trial when he told the Labour Party conference "those believed to be part of organised crime will have their assets confiscated, their bank accounts opened up and if they intimidate juries, face trial without a jury". Finally, in 2010, a non-jury trial for a serious indictable offence was conducted in England for the first time in over 350 years. 141

This article does not overtly engage with the legitimacy of abandoning trial by jury. As was noted in the introduction, from a Weberian rationalist point of view there are good grounds for arguing that jury trial is arbitrary and irrational. This author would contend that such arguments do not pay sufficient attention to the non-legal functions of the jury. The jury can provide political legitimacy through its involvement of the governed in the process of governing. 142 Leaving those arguments aside, it is important to note that Ireland and New Zealand have not abandoned jury trial on the basis that it is substantively irrational — both states maintain trial by jury. Rather, they have restricted the jury in certain contexts while maintaining an apparent commitment to the jury more generally.

Historically, the threat of terrorism has provided momentum for those seeking to limit access to jury trial. For example, section 3 of the *Northern Irish Civil Authorities (Special Powers) Act* 1922 allowed for trial by courts of summary jurisdiction for offences against the regulations. Most famously, in Northern Ireland the

⁽London, January 23, 2012) < http://bit.ly/Guardian-Bowcott-Juror-online-res; Josh Halliday, "Facebook Juror and Defendant Guilty of Contempt" *The Guardian* (London, June 14, 2011) < http://bit.ly/Guardian-Halliday-Facebook-juror all accessed November 5, 2012; and Lowe (n.24), 184-189.

¹⁴⁰ Tony Blair, Speech to the Annual Labour Party conference (Brighton Centre, September 28, 2004) http://news.bbc.co.uk/2/hi/uk news/politics/3697434.stm accessed November 5, 2012.

¹⁴¹ Jeremy Britton, "Jury-free Court Case Makes History in England" *BBC News* (London, March 31, 2010) http://news.bbc.co.uk/2/hi/uk news/8592505.stm accessed November 5, 2012.

¹⁴² Fergal F. Davis, "The Jury as a Political Institution in an Age of Counter-Terrorism", *POLITICS* (forthcoming 2013) http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9256.2012.01448.x/abstract accessed November 5, 2012.

Diplock Commission preferred trial without a jury to internment.¹⁴³ The recommendations of the Diplock Commission were given legislative form in the *Northern Ireland (Emergency Provisions) Act* 1973. The "Diplock" model of the Crown Court sitting without juries has been employed to hear terrorist-related indictable offences in Northern Ireland ever since,¹⁴⁴ and arguably provided the model for Part 7 of the *Criminal Justice Act* 2003. At present, terrorism trials in England and Wales are conducted with a jury. However, given the general undermining of the institution, the historic tendency to remove the jury in the context of terrorism, and the possibility of the *Criminal Justice Act* 2003 being employed in terrorism cases, it seems apposite to consider once again the role of trial by jury in the context of terrorism.

The Irish experience demonstrates that once jury trial is limited in the counter-terrorism context it becomes very easy to extend that restriction to other "analogous" groups - such as gang-related offences. The portraval of organised crime as the "new terrorism" allowed for a gradual erosion of the right.¹⁴⁵ The comfort of the "security blanket" was easily extended from the context of national security to that of organised crime. By drafting the legislation widely and granting the DPP the discretion to determine when the Special Criminal Court should be used, the Dáil can avoid overtly acknowledging that it has facilitated a broad abolition of the right to jury trial. In New Zealand, the legislation does not rely on a national security threat for its justification. However, the first attempts at utilising the broad powers contained in the Crimes Act 1961 (as amended) were justified on the basis of the threat of terrorism, this being seen as the most compelling context within which these provisions could be used. In both Ireland and New Zealand, the interference with the right to trial by jury has been presented as necessary in a limited set of circumstances but the legislation is drafted in such a manner that a more extensive restriction on jury trial is possible. It is also interesting that both states have seen a conflation of the threat of terrorism and gang-related crime. It is contended that in such circumstances it is likely that the "security blanket" of non-jury trial will be employed in a widening set of circumstances.146

¹⁴³ Lord Diplock, Report of the Commission to Consider Legal Procedures to Deal With Terrorist Activities in Northern Ireland, (Cmnd 5185, 1972).

¹⁴⁴ Northern Ireland (Emergency Provisions) Act 1973.

¹⁴⁵ Conway, Mulqueen (n.20).

¹⁴⁶ *ibid*.

IV. CONCLUSION

Ireland and New Zealand have both determined that the right to trial by jury is potentially problematic. In Ireland, there is a long history of the Special Criminal Court being employed in the context of terrorism, and that court's use has always been justified on the basis of an existing terrorist threat. In New Zealand, terrorism has not been employed as a justification for removing the right to trial by jury; instead a risk of juror intimidation in gang-related cases was asserted. In both jurisdictions, the risk to trial by jury in the context of terrorism and gang-related cases has been treated as identical, on the apparent basis of a world-view which sees terrorism and gang-crime as analogous.

Both states maintain a commitment to trial by jury in principle, but their widely drafted legislation facilitates the growing abandonment of jury trial, without an attendant debate on the desirability of doing so. This debate is not moot. Juries may be arbitrary, may not understand the evidence before them, or may be biased. The importance of trial by jury has often been overstated; its historical significance has been overplayed; and its removal is potentially justifiable.

However, if wholesale reform were proposed, and both states opted to have non-jury trial on a principled basis, one would expect wide ranging reform of the rules of evidence and court procedure to account for the fact that the arbiter of fact and law was now unified in a single body – the judge. It is important that the erosion of the right to trial by jury is not simply the result of the gradual stretching of the security state. By purporting to remove the jury for a select number of cases, but in fact facilitating an ever widening use of non-jury procedures, states can find that they have abandoned the jury, without adequately reflecting on the significance of such reforms. The abolition of so ancient an institution ought to be justified – it should not be the result of normalisation or creep.

JURISDICTION SPOTLIGHT: THE COMMONWEALTH CARIBBEAN

JOHN S. JEREMIE S.C.*

ABSTRACT

In all Commonwealth Caribbean States, independence led to an age of Constitutionalism, marked by governing principles contained in the new states' respective Bills of Rights. These states' criminal justice systems have faced a number of challenges since the end of the colonial era. They are currently confronted by a drive to reform the substantive criminal law, and the rules of procedure and evidence, with a view to curtailing rising crime rates and thwarting the funding of criminal and terrorist organisations. This spotlight: (i) examines developments regarding the death penalty, (ii) considers reforms to the right to bail and to the substantive law relating to financial crime, along with proposals to abolish preliminary enquiries; (iii) ponders the vexed question why so many Commonwealth Caribbean states retain the Privy Council as their final court of appeal; and (iv) gives a brief overview of the right to practise in Commonwealth Caribbean States.

I. OVERVIEW OF THE CURRENT STATE OF THE CRIMINAL JUSTICE SYSTEMS IN THE COMMONWEALTH CARIBBEAN

The social context shapes any discussion of the current state of criminal justice systems in the Commonwealth Caribbean. Spiralling crime rates provide the social context that is now operating. In all Commonwealth Caribbean¹ states, the substantive criminal law and the law of criminal procedure are in a state of substantial change. In Jamaica, The Bahamas, Trinidad and Tobago, Belize, and many of the territories that comprise the Organisation of Eastern Caribbean States² (OECS), legislatures are rushing to embark on far-reaching, radical reforms that, without the benefit of much empirical evidence, it is hoped, will curb spiralling crime rates.

As the Caribbean struggles to preserve the reputation for tranquillity that is critical to the economic lifeline of tourism that now keeps many Caribbean states afloat, legislation has been generally perceived

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¹ For the purposes of this article the Commonwealth Caribbean means Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago, which are the independent Commonwealth Caribbean states.

² The Organisation of Eastern Caribbean States includes many of the Commonwealth Caribbean states which have attained independence and which are referred to in n.1. They include Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia and Saint Vincent and the Grenadines.

to be a "quick fix" to all that ails creaking criminal justice systems. There is a continuing and largely unresolved question concerning the use of the death penalty. In most Commonwealth Caribbean states this penalty remains popular but its use has been curtailed by a host of decisions of the Privy Council. There have been controversial (perhaps unconstitutional) legislative amendments in certain territories that have restricted the right to be granted bail in certain circumstances. There has been piecemeal amendment of the rules of evidence, particularly in relation to the use of bad character evidence, in certain territories. In some of the territories anti-gang legislation has been enacted. Penalties with respect to the possession of unlawful firearms have been dramatically toughened. In respect of financial crime, many states have enacted measures to ensure that they are removed from, or kept off, the Financial Action Task Force (FATF) blacklist.³ In many states, extensive reforms that have had the effect of eroding the common law rules relating to bank secrecy have, as a consequence, been enacted, as have a raft of provisions characteristically demanded by the FATF in order to combat money laundering and terrorist financing and to allow for the freezing of assets in defined circumstances in respect of certain predicate offences.

In the face of rapidly escalating crime rates many of those territories that "survive or die" on the basis of tourist revenue seem prepared to try anything that might help to make the task of prosecutors easier. The *ancien regime* of colonial legislation and traditional common law rules, which were underpinned by the familiar adage, "It is better that 99 guilty men go free than one innocent man be convicted", has been firmly consigned to the dustbins of colonial lore. While the emphasis is on short-term, political gains to be won by "get tough on crime" legislation, too little work is being devoted to the cause of holistic reform of the criminal justice system.

The states of the Commonwealth Caribbean seem unable even to take concrete action on the necessity for a single final court of appeal. The result is that, of the fourteen states in the Commonwealth Caribbean, only three have subscribed to the Caribbean Court of Justice in its final appeal jurisdiction.⁴ For the rest, the Privy Council remains the final port of call for all final appeals, including criminal appeals. Likewise, the hard work that is required to be done to reform courts, to provide for specialist drug courts, to train prosecutors, to staff courts with well-qualified judges, to reform rules of procedure, including the abolition of preliminary inquiries, and rules of evidence, to embark on meaningful police service reform, and to provide

³ The FATF is an inter-governmental body, established in 1989 with the aim to develop and promote policies to combat money laundering and terrorist financing.

They are Barbados, Belize and Guyana.

alternative solutions to a life of crime for the increasing number of unemployed youths, as necessary as it is, seems to be neglected for short-term, and perhaps illusory, political gains.

II. CRIMINAL JUSTICE SYSTEMS IN THE CARIBBEAN – THE SUBSTANTIVE LAW

At the outset, it must be borne in mind that the description "the Caribbean" is no more helpful as a definition of the laws of any of the independent states that comprise the Caribbean than is the description "Africa". Unlike Canada and the United States, there is in the Caribbean no federation of states united by a common constitution, a common legislature, a common executive, or for that matter a common judiciary. There is not, as in Europe, a common legislative body, or a common constitutional instrument such as a declaration of human rights. Caribbean political and judicial institutions are only now maturing. The Caribbean (as is so in Africa) is in truth nothing but a number of independent states, each with its own executive, its own legislature, its own constitution and Bill of Rights, its own integrated systems of laws and generally its own judicial system.

A. The "Four Pillars" of Commonwealth Caribbean Law

The substantive criminal law in the Commonwealth Caribbean customarily comprises four elements. These are laid out largely in chronological order. They are the law preceding each state's constitution; the constitution itself; laws enacted after the constitutions were adopted; and case law. The chronological ordering is significant: the "savings laws clauses" present in various Caribbean constitutions largely protect preceding laws from invalidity; therefore the constitutions create a "watershed" of earlier laws (pillar one), which remain in force even though incompatible with the constitution, and laws enacted under the constitution (pillar three), which must abide by its strong guarantees of civil and political freedoms.⁶

1. Pre-constitutional law

This first category of laws includes the common law and statutes of general application of England and Wales on a particular date, as incorporated in each state largely by local legislation. It also includes laws passed by local legislatures of each Caribbean colony before the adoption of their respective Constitutions.

⁵ See further Part II.A.2., post.

⁶ See further Part II.B. post.

In this context, it is necessary to attempt to trace briefly the historical sources of the law in each territory. That is because varying historical developments, and a lack of a mature integration process, are reflected in important differences in the present day substantive law of the territories in the Caribbean. In some territories, there is a provision in legislation that deems that the common law in force in England and Wales, and statutes of general application enacted by the Westminster Parliament, are incorporated into the law of the state with effect from a date certain. In Trinidad and Tobago, by virtue of the Supreme Court of Judicature Act 19628, "the common law, doctrines of equity, and statutes of general application of the Parliament of the United Kingdom that were in force in England [on 1 March 1848] [are] deemed to have been enacted and to have been in force in Trinidad as from that date and in Tobago as from 1 January 1889". In Jamaica, by virtue of the Interpretation Act 1968,9 "all such laws and statutes and statutes of England as were, prior to the commencement of 1 Geo. II Cap. 1 [that is, prior to 1727], introduced, used, accepted or received, as laws of this Island, shall continue to be laws in the Island, save in so far as any such laws or statutes have been or may be repealed or amended by a Law of the Island". In Barbados, Antigua, and St Kitts and Nevis, the original settlers are deemed to have taken with them English law in force in the seventeenth century. In The Bahamas, Dominica and Grenada, various statutes, a declaratory Act and two proclamations incorporated the common law by various formulae in the eighteenth century. 10

2. The constitution

Each Caribbean state's constitution serves as a bedrock for individual rights guaranteed in that jurisdiction, and against which all law falls to be tested. These constitutions formed a symbolic "break" with the colonial powers – the United Kingdom retains an "unwritten constitution" – though enacted by Parliament at Westminster. The effect of specific constitutions, and in particular, of the savings provisions enacted therein, is examined in Part II.B., *post*. Most Caribbean constitutions follow the same model, and include a preamble (with the exception of Jamaica) and chapters on:

⁷ This is the position in Dominica, Grenada, and Jamaica.

⁸ Ch. 4:01 (Trinidad and Tobago).

⁹ Cap. 165 (Jamaica).

¹⁰ The position is somewhat complicated but is succinctly set out in Gilbert Kodilinye, *Commonwealth Caribbean Tort Law* (4th edn, Routledge 2009), ch. 1.

¹¹ The autonomy, or otherwise, of such Constitutions, and philosophical questions of the legitimacy of such constitutions, are outside the scope of this article. On this point, see, for example, Rose-Marie Belle Antoine, *Commonwealth Caribbean Law And Legal Systems* (2nd edn, Routledge 2008), ch. 7.

- a) citizenship;
- b) a Bill of Rights, laying out the fundamental rights and freedoms of citizens;
- c) the appointment and powers of the Head of State;
- d) the establishment and powers of the Legislature (including a standard statutory formula that Parliament may "make laws for the peace, order and good government" of the state);
- e) Executive powers;
- f) the Judicature;
- g) finance; and
- h) the Public Service.¹²

In addition, each constitution contains a powerful "savings law clause." For example, the *Constitution of Jamaica* 1962, sub-sections 26(8) and (9), provide:

- (8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.
- (9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day [August 6, 1962,] shall be deemed not to have ceased to be such a law by reason only of
 - a. any adaptations or modifications made thereto by or under section 4 of the *Jamaica (Constitution) Order in Council* 1962 [which enacted the *Constitution*], or
 - b. its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision.

Thus, criminal statutes which violate the *Constitution*, but which were passed before its enactment on August 6, 1962, will generally be protected; whereas modern reforms enacted thereafter will need to pass strict constitutional muster. This has raised interesting legal problems, as will be outlined in Part II.B., *post*.

3. Legislation enacted under the constitution

Legislation as specifically enacted in each state (the Caribbean States all possess independent legislatures) after the enactment of the respective constitutions is bound by the provisions of each constitution. This is known as the "principle of constitutionality." Thereby, any

¹² The ordering of each constitution will vary; this is that of the *Constitution of Jamaica* 1962.

legislation deemed not to abide by the Constitution is automatically invalidated. The significance of this principle is examined in Part II.B., post.

4. Case Law

Finally, there is the case law as it has developed in England and Wales, and in the Caribbean. This pervades the other three pillars, forming part of the common law adopted. As will be seen, ¹³ British courts have played a fundamental role in Caribbean criminal law, and the colonial legacy of the Privy Council's appellate jurisdiction has continued to be fundamental in the development of case law after the enactment of Caribbean states' constitutions.

B. Laws Divided by Constitutions

In Caribbean criminal law, the Constitution – the single most important pillar – often becomes intertwined with the three other substantive pillars of the law, raising particularly complex legal questions. In all Commonwealth Caribbean states, there are written constitutions that contain a Bill of Rights. The constitutions all provide that they are the supreme law, and as a necessary inference the courts will ensure that any law that is inconsistent with the constitution is invalidated by reason of such inconsistency. This can be described as the principle of constitutionality.

The principle of constitutionality has been applied by Caribbean courts and the Privy Council to strike down substantive criminal legislation that either impinges on the separation of powers or derogates from the rights secured to the individual by relevant Bills of Rights.

Insofar as the separation of powers is concerned, the celebrated case of *Hinds v. The Queen*¹⁴ decided that an attempt by the Government of Jamaica to deal with an epidemic of gun-related homicides by the establishment of a special "Gun Court," conflicted, to an extent, with the *Constitution of Jamaica*. The *Gun Court Act* 1974 established the Gun Court and provided that it should have three divisions. The Full Court Division was to be constituted by three resident magistrates, and its jurisdiction was to cover any firearms offence, or other offence committed by a person detained for a firearms offence (except capital offences), and was to cover the whole island of Jamaica. When the *Constitution* came into force, such jurisdiction had only been exercisable by a Supreme Court judge in the Circuit Court. The Privy Council held (by a majority) that Parliament was not entitled to vest in a new court composed of

¹³ Especially in Part II.B., post.

¹⁴ Hinds [1977] A.C. 195 (Privy Council).

members of the lower judiciary a jurisdiction that was characteristic of a "Supreme Court". However, the court also held that the other two divisions of the Gun Court only geographically extended the jurisdiction of a Supreme Court judge sitting in a Circuit Court and were, therefore, not contrary to the Constitution. The *ratio* of the case was followed and applied by the Privy Council in *DPP of Jamaica v. Mollison*, here it was held that legislation that provided for a juvenile to be detained "during the Governor General's pleasure" (*i.e.* the executive) was incompatible with the separation of powers and was, accordingly, unconstitutional. All Commonwealth Caribbean states have a similar constitutional structure, and *Hinds* and *Mollison* are to be regarded as good law throughout the Caribbean.

As far as the death penalty is concerned, the position is more As a general rule, in the Commonwealth Caribbean the death penalty is provided for by colonial legislation as the mandatory sentence for murder. In Matthew v. State of Trinidad and Tobago, 16 the mandatory sentence of death for murder was upheld by the Privy Council for the purposes of Trinidad and Tobago by a nine-member board of the Judicial Committee of the Privy Council which essentially reversed (by a bare majority of 5:4 which included Zacca J., who was Chief Justice of Jamaica for 11 years to 1996) its earlier decision in Roodal v. State of Trinidad and Tobago¹⁷ decided in early 2003. The Privy Council had, in deciding Roodal, unexpectedly quashed a closely reasoned decision of a particularly strong Trinidad and Tobago Court of Appeal¹⁸) which was delivered by De La Bastide C.J. (as he then was¹⁹). The court in *Matthew* upheld the mandatory sentence of death for murder in Trinidad and Tobago, and held, inter alia, that the sentence was provided for in a written law which had been in existence prior to the enactment of the 1976 constitution, specifically section 4 of the Offences against the Persons Act 1925 (Trinidad and Tobago). Since the Constitution of Trinidad and Tobago contained a particularly robust form of "savings law clause", the court held the sentence of death to be saved and, therefore, valid law in Trinidad and Tobago, even though the court accepted that the sentence itself was in violation of the protections afforded to the individual by the Bill of Rights provisions in the constitution.

The position in Trinidad and Tobago with respect to the death penalty is the same as it is in Barbados for, on the very day that *Matthew* was decided, the Privy Council, constituted as in *Matthew*

¹⁵ Mollison [2003] UKPC 6, [2003] 2 A.C. 411.

¹⁶ Matthew [2004] UKPC 33, [2005] 1 A.C. 433.

¹⁷ Roodal [2003] UKPC 78, [2005] 1 A.C. 328.

¹⁸ Roodal v. State of Trinidad and Tobago, unreported, July 17, 2002 (Court of Appeal of Trinidad and Tobago).

¹⁹ Michael de La Bastide became President of the Caribbean Court of Justice, 2004-11.

and split as in *Matthew*, declared this to be so in *Boyce v. The Queen*²⁰ (argued at the same time as *Matthew* and decided on the same basis). In the smaller Commonwealth Caribbean States that comprise the OECS and Belize, the Privy Council (in the so-called trilogy of cases of *Reyes v. The Queen*²¹, R. v. Hughes²² and Fox v. The Queen²³) has held the mandatory sentence to be unconstitutional on the ground that the savings law clauses in those territories are less robust.

In Jamaica, death sentences were ruled to be unconstitutional because they are contained in a law enacted after the passage of the Constitution,²⁴ in violation thereof. Accordingly, no question of death sentences being saved by the constitution arose. This was decided in Watson v. The Oueen (Att.-Gen. for Jamaica intervening), 25 the appeal from the Court of Appeal of Jamaica which was argued together with Matthew and Boyce. More recently, the Privy Council, in Nimrod Miguel v. State of Trinidad and Tobago, 26 has used the same reasoning to strike down legislation in Trinidad and Tobago which was enacted after the constitution and which provided for the imposition of the death penalty for a class of murder which can be described as similar to the felony murder category at common law.²⁷ The Criminal Law Act 1997 provided that killing another during the course of committing an "arrestable offence" was punishable by the death penalty. Although the constitutionality of the Act was not the subject of argument in the Trinidad and Tobago Court of Appeal, the Privy Council expressly ruled the legislation unconstitutional on the same basis that the legislation in Watson was held to be unconstitutional, and that the legislation was not saved by the constitution from invalidity as a law in being at the time the constitution was enacted.

C. Key Developments

1. Financial crime

In all Commonwealth Caribbean States there has been considerable effort expended on the enactment of legislation for the purpose of ensuring that states comply with the forty recommendations (on money laundering) and nine special recommendations (on

²⁰ Boyce [2004] UKPC 32, [2005] 1 A.C. 400.

²¹ Reyes [2002] UKPC 11, [2002] 2 A.C. 235.

²² Hughes [2002] UKPC 12, [2002] 2 A.C. 259.

²³ Fox [2002] UKPC 13, [2002] 2 A.C. 284.

²⁴ By the Offences Against the Persons Act 1992 (Jamaica).

²⁵ Watson [2004] UKPC 34, [2005] 1 A.C. 472.

²⁶ Nimrod Miguel [2011] UKPC 14, [2012] A.C. 361.

²⁷ The law with respect to the mandatory death penalty is addressed by the author in two case notes: John Jeremie, "The Caribbean death penalty saga" (2012) 128 Law Quarterly Review 31; "The Final Act of the Caribbean Death Penalty Saga", (2012) 128 Law Quarterly Review 485.

terrorist financing) of the FATF. The domestic criminal law of many states has been heavily shaped by attempts to thwart the funding of terrorist organisations through offshore finance. This focus has grown keener since the events of September 11, 2001, but the FATF had for some time been working actively with certain states on law reform. The common themes were defined at the core by anti-money laundering and counter terrorist financing strategies. The focus of attention in the Caribbean was not limited to independent Commonwealth states, but has extended also to the British Overseas Territories of the British Virgin Islands, the Cayman Islands, and Bermuda. States such Antigua and Barbuda and the Bahamas have attracted particular attention - in the latter, a raft of enactments were introduced in 2000, including the Banks and Trust Companies Regulation Act 2000, the Central Bank of the Bahamas Act 2000, the Proceeds of Crime Act 2000, the Financial Intelligence Unit Act 2000, the Financial Transactions Reporting Act 2000, the International Business Companies Act 2000, the Evidence (Proceedings in other Jurisdictions) Act 2000 and the Criminal Justice (International Cooperation) Act 2000. Other Commonwealth Caribbean States were encouraged to move with varying degrees of alacrity after the events of September 11 to enact legislation which met the anti-money laundering and countering of terrorist financing objectives through the accepted "3D" strategies detect, disrupt and deter.²⁸

The legislation has given rise to, and thus far survived, constitutional challenges in the Commonwealth Caribbean. In particular, there were challenges before the Eastern Caribbean Court of Appeal,²⁹ in *Antigua Commercial Bank v. Humphreys*,³⁰ to mandatory disclosure requirements, and before the Court of Appeal of the Bahamas, in *Att.-Gen. v. Financial Clearing Corporation*,³¹ in relation to certain powers of the Financial Intelligence Unit (FIU). In the *Financial Clearing Corporation* case the powers in question related to the ability of the unit to restrain transactions of an account holder for defined periods. Although the powers were provided for without court authorisation, an aggrieved account holder could move the court to have the restraint order discharged. There were two bases of challenge.

²⁸ See generally (2011) 36(2) West Indian Law Journal, a special issue on "Financial Crime in Jamaica".

²⁹ Established by the members of the OECS in 1967.

³⁰ ACB v. Humphreys, 75 W.I.R. 237 (Eastern Caribbean Court of Appeal): "the bank was not entitled to disclose any information whatsoever in relation to the customer's account unless the procedures specified by the statute for disclosure were met" – i.e. they had the customer's consent or a court order.

³¹ Financial Clearing Corporation, unreported, October 8, 2002 (Court of Appeal of the Bahamas): the right to privacy in the Constitution of the Bahamas, art. 21, did not include a "right not to have one's personal banking information disclosed".

The first was that the powers breached the prohibition against the unlawful deprivation of property, which exists in all territories in Commonwealth Caribbean constitutions. The second was that the powers violated the separation of powers doctrine in that they were in substance powers typically reserved to the judiciary. A majority of the Court of Appeal decided that the legislation was in fact constitutionally proper.

It is submitted that the minority judgment of Osadebay J.A. in the Bahamas Court of Appeal³² is probably stronger in relation to both bases of challenge in respect of which the judge held that the provisions of the Constitution of the Bahamas had in fact been breached, and that the FIU had used powers typically reserved to the judiciary. In so finding, the minority relied heavily on the decision in *Att.-Gen. of the Gambia v. Momodou Jobe*,³³ in which the Privy Council examined powers exercised by a state functionary against the structure and the rights guaranteed by the Constitution of the Gambia.

Certain of the powers insisted on by the FATF may well encounter difficulty in surviving a concerted constitutional challenge: in particular, the provision for pre-trial extra-judicial civil restraint on dealing with property probably contravenes the prohibitions against unlawful deprivation of property which exists in all states. The restraint powers are also vulnerable on the orthodox separation of powers doctrine, insofar as they attempt to allow for persons other than judicial officers to exercise restraint powers which are typically judicial powers. It is likely that, on orthodox *Hinds*³⁴ principles, the latter class of powers, if entrusted to ordinary technocrats subject to ministerial control, will be held to be unconstitutional³⁵.

2. Bail

The right of accused persons to bail is an inherent aspect of the criminal justice system in any democratic society. In the Commonwealth Caribbean, given the social context described above, governments have increasingly sought to curtail this right as they have become progressively frustrated at the lengthy delays between arrest and conviction, and the tendency of persons to commit further offences whilst on bail.

In Trinidad and Tobago a series of *Bail (Amendment) Acts* that abridged the right to bail were passed by the Parliament with the requisite constitutional majority each of which contained a "sunset" clause of increasing duration. Finally, the *Bail (Amendment) Act* 2008

³² In Financial Clearing Corporation, ibid.

³³ Momodou Jobe [1984] A.C. 689 (Privy Council).

³⁴ (n.14.)

³⁵ ibid.

(Trinidad and Tobago)³⁶ was enacted by the legislature. The Act was passed with a "special majority" and it sought to curtail the right to bail of persons accused of scheduled offences for varying periods of time. Subsequent to its enactment, yet another amendment sought to restrict the right to bail of accused persons who were members of a "gang" as defined by the *Anti-Gang Act* 2011 (Trinidad and Tobago).³⁷

Both pieces of legislation are still on the statute books and are being enforced. Both are clearly unconstitutional. In State of Mauritius v. Khoyratty,38 the Privy Council struck down an amendment to the Bail Act 1999 (Mauritius) that limited the grant of bail to persons charged in respect of certain drug offences. The relevant amendment was deeply entrenched in the constitution having been made by way of a constitutional amendment that was then passed by the Parliament with the prescribed majority. The Privy Council, however, upheld the decision of the Court of Appeal of Mauritius to strike down the enactment on the ground that it was inconsistent with the principle of the separation of powers. The board held that the right to bail was a matter for control by the judiciary and, by analogy with the decision in Hinds,³⁹ the executive could not, however great the legislative effort to curtail the right, properly exercise a judicial power in a democratic society as defined by the separation of powers doctrine. There is no reason to believe that a similar result will not occur if the Bail (Amendment) Act of Trinidad and Tobago is tested.

III. CRIMINAL JUSTICE SYSTEMS – THE COURT STRUCTURE

The court system in much of the Caribbean, as with the substantive law, reflects the colonial past of the territories. It is depicted in the diagram opposite.

In the Commonwealth Caribbean, as a general rule, it is the magistrates' courts that absorb the greater portion of the flow of criminal matters⁴⁰. All matters are dealt with by a magistrate, whether in the form of a complete trial where the offence is one that can be lawfully dealt with by a magistrate or, where it is not, in the form of a preliminary enquiry when it falls to be tried before a judge

³⁶ Act No. 7 of 2008.

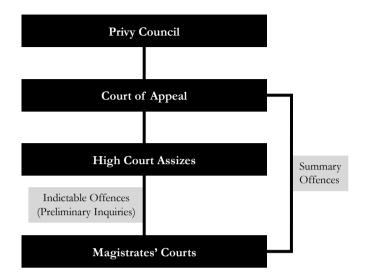
³⁷ Act No. 10 of 2011.

³⁸ Khoyratty [2006] UKPC 13, [2007] 1 A.C. 80.

³⁹ (n.14.)

⁴⁰ The law on Criminal Procedure in the territories of the Commonwealth Caribbean is comprehensively set out in meticulous and admirable detail by Dana Seetahal in her authoritative text, *Commonwealth Caribbean Criminal Practice and Procedure* (3rd edn, Routledge, 2010), 172-173.

TYPICAL CARIBBEAN CRIMINAL COURT SYSTEM



and jury. In respect of the latter, the magistrate conducts a full preliminary enquiry during which evidence is led, submissions are made, and inevitably there is cross-examination of the witnesses.

Two territories, St Lucia and Antigua, have abolished preliminary In St Lucia this was done by an amendment to the criminal code⁴¹ that created one single Criminal Division of the High Court of St Lucia.⁴² There is an initial hearing before a magistrate and a sufficiency hearing before a judge. All criminal proceedings, be they summary or indictable, are started by way of a complaint filed in the Criminal Division. The amendment allows for rules to be made for the procedure governing indictable offences. Criminal Procedure Rules provide for the magistrate to hold only an initial hearing at which formalities are attended to: these will include the making of a scheduling order stipulating the dates by which various matters such as disclosure are to take place and the fixing of a date for a sufficiency hearing. The judge at the sufficiency hearing examines the written evidence and makes a determination as to whether a prima facie case has been made out. In Antigua the full "preliminary enquiry" has been abolished by the Antigua Magistrates' Code of Procedure (Amendment) Act 2004.43 However, the magistrate now conducts the committal proceedings,

Effected by the Criminal Code Amendment Act 2008, (St Lucia), Act no. 11 of 2008.

⁴² Administratively, this is part of the Eastern Caribbean Supreme Court.

⁴³ Act No. 13 of 2004 (Antigua).

and the decision to commit is made by him on the basis of written statements and exhibits of the parties.⁴⁴

One territory, Trinidad and Tobago, is about to embark on similar reforms. The *Administration of Justice (Indictable Proceedings) Act* 2011⁴⁵ will abolish the full "preliminary enquiry" and provide for committal proceedings before a master of the High Court. The master will have a sufficiency hearing where he will review the papers and make a determination as to whether to commit or to discharge the accused. Summary trials will be conducted before magistrates in accordance with the normal protocols.

In all of the territories in the Commonwealth Caribbean, the more serious offences are tried on indictment and so are tried before a judge and jury. The relatively speaking less serious offences may be dealt with summarily by a trial in a magistrates' court. Certain offences are described as "triable either way:" what this means in practice is that the matter might be dealt with in the form of a trial before either a magistrate or a judge and jury, at the option of the parties or, in some cases, at the direction of the Director of Public Prosecutions.

IV. THE PRIVY COUNCIL AND THE CARIBBEAN COURT OF JUSTICE

In 2009, upon his installation as first President of the Supreme Court of England and Wales, Lord Phillips of Worth Matravers, made a number of remarks on the continuing drain on his judicial resources which was caused by having Britain's "top judges" assigned to hear appeals from the Caribbean in the Privy Council⁴⁶. These statements were widely disseminated in the international press. What was not mentioned, and has not been pointed out since, is the presence in the Caribbean of the Caribbean Court of Justice (CCJ), a court established by agreement of the heads of state of the Caribbean Community (CARICOM) in 2005 for the very purpose of hearing final appeals which had, before its establishment, been exclusively directed to the Privy Council from all Caribbean territories.

⁴⁴ The Antigua Law abolishing the preliminary enquiry was upheld by the Privy Council in *Humphreys v. Att.-Gen. of Antigua and Barbuda* [2008] UKPC 61, [2009] 4 L.R.C. 405; the Board considered that the preliminary enquiry was not indispensable to the system of justice. What the constitution required was a system of laws that was fair.

⁴⁵ Act No. 20 of 2011 (Trinidad and Tobagol).

⁴⁶ As reported in the on Michael Peel, Jane Croft, "Privy Council hampers Supreme Court", *Financial Times* (London, September 21: 2009). Lord Phillips is quoted as saying, of the time spent by Supreme Court Justices on Privy Council appeals: "It is a huge amount of time. I personally would like to see it reduced. It's disproportionate.".

No one can provide a convincing answer to the question why Caribbean governments have not embraced the Caribbean Court of Justice. So far only Barbados, Belize and Guyana have incorporated the court into the structure of their court systems. In an impassioned plea made in Port of Spain, former Secretary-General of the Commonwealth, Sir Shridath Ramphal remarked that:

"It is almost axiomatic that the Caribbean Community should have its own final court of appeal in all matters. A centuryold tradition of erudition and excellence in the legal profession of the region leaves no room for hesitancy. Ending the jurisdiction of the Judicial Committee of the Privy Council was actually treated as consequential on Guyana becoming a Republic 39 years ago. I am frankly ashamed when I see the small list of Commonwealth countries that still cling to that jurisdiction – a list dominated by the Caribbean. Now that we have created our Caribbean Court of Justice in a manner that has won the respect and admiration of the common law world, it is an act of abysmal contrariety that we have withheld so substantially its appellate jurisdiction in favour of that of the Privy Council – we who have sent judges to the International Court of Justice, to the International Criminal Court and to the International Court for the former Yugoslavia, to the presidency of the United Nations Tribunal on the Law of the Sea; we from whose Caribbean shores have sprung in lineal descent the current Attorneys-General of Britain and of the United States.⁴⁷

"This paradox of heritage and hesitancy must be repudiated by action – action of the kind Belize has just taken to embrace the appellate jurisdiction of the CCJ and abolish appeals to the Privy Council. It is enlightened action taken by way of constitutional amendment, and Belize deserves the applause of the Caribbean Community – not just its legal fraternity. Those countries still hesitant must find the will and the way to follow Belize – and perhaps it will be easier if they act as one. The truth is that the alternative to such action is too self-destructive to contemplate. If we remain casual and complacent about such anomalies much longer we will end up making a virtue of them and lose all we have built." 48

The court boasts impressive mechanisms to secure judicial independence. Judges are appointed by an independent commission, the Regional Judicial and Legal Services Commission. They enjoy

⁴⁷ Sir Shridath refers to Baroness Scotland and Eric Holder, Jr, respectively;

⁴⁸ Sir Shridath Ramphal, "Caribbean Judiciaries in an era of Globalization: The Paradox of Heritage and Hesitancy" (public lecture, Hyatt Regency Hotel, Port of Spain, Trinidad and Tobago, June 25, 2009).

a tenure that is as secure from interference as any that is guaranteed by the constitutions of the Commonwealth Caribbean states. In Independent Jamaica Council for Human Rights (1998) Ltd v. Marshall-Burnett, 49 the Privy Council struck down legislation in Jamaica, which was designed to replace the Privy Council with the Caribbean Court of Justice, on the ground that the court did not contain mechanisms for securing judicial independence which was consistent with the Constitution of Jamaica. The decision was unfortunate and represents a narrow view as to the nature of what is required to maintain judicial independence. The Jamaica Parliament now has before it for debate a host of enactments that, if passed, will have the effect of replacing the Privy Council with the Caribbean Court of Justice. It is to be hoped that the legislation will garner the necessary support. In Trinidad and Tobago, a proposal by the Prime Minister to replace the Privy Council with the Caribbean Court of Justice, but only in respect of criminal matters (whatever that might be taken to mean), has found favour with neither the opposition in Parliament, nor with the Prime Minister's fellow heads of state. The approval of the latter was required because the proposal in effect amounted to a breach of the treaty commitment made in 2005 to introduce the court as a final court of appeal in all matters. The point was forcefully made that not only would this amount to a breach of the treaty by which the court was established, but that the proposal was unworkable as criminal appeals could not properly be distinguished from constitutional appeals, the more so given the analysis undertaken in cases such as Miguel. 50

It certainly cannot be the case that there are legitimate concerns about the quality of the judges of the Caribbean Court of Justice. Sir Shridath's comments put that issue firmly to rest. The early fears expressed by some that the court would simply be a "hanging court" must likewise have been stilled both by the early jurisprudence of the court⁵¹ and more recently by the appointment to the Presidency of

⁴⁹ [2005] UKPC 3; [2005] 2 A.C. 356.

^{50 (}n 26)

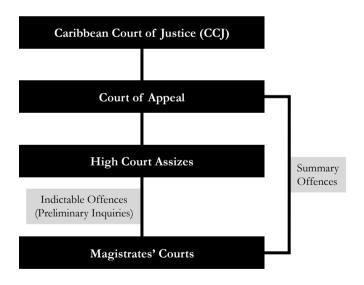
⁵¹ In Attorney-General and Superintendent of Prisons v Joseph and Boyce [2006] CCJ 1, the court dismissed an appeal by the Government of Barbados which had been prevented from carrying out a sentence of death in circumstances where the prisoners had petitions pending before the Inter American Commission. The Court held that the decision of the Barbados Privy Council (a mercy committee) was amenable to review, and that if the Committee proceeded to make a determination as to the exercise or denial of pardon in circumstances where there was a legitimate expectation that the State of Barbados would, consistent with its treaty obligations, await the determination of the condemned prisoners petition by the Inter American Commission, that would amount to a reviewable breach of procedure of the Barbados Privy Council. The Caribbean Court of Justice also approved and applied the five-year limit established by the Privy Council in Pratt and Morgan v. Att.-Gen.

the Court of Sir Dennis Byron, the Chief Justice of the Eastern Caribbean Court of Appeal at the time Fox⁵² and Hughes,⁵³ which curtailed the use of the death penalty in the OECS, were decided.⁵⁴

Of course it is by no means certain that the adoption of the Caribbean Court of Justice will automatically translate itself into an improvement in the delivery of criminal justice in the Commonwealth Caribbean. What is certain, however, is that the patriating of the court will reflect Caribbean values because the court is necessarily a creation of, and patriated in the Caribbean. In this sense, the adoption of the court as a final court of appeal in the region is an urgent necessity for the proper dispensation of justice and punishment that is of the Caribbean and for the Caribbean in a way that cannot perhaps be achieved by a foreign court.

The court structure in Barbados, Belize and Guyana with the Caribbean Court of Justice at the pinnacle, is depicted hereunder. The proposal is that this should become the structure as a general principle for all of the territories that have signed the Agreement Establishing the Caribbean Court of Justice.

CARIBBEAN CRIMINAL COURT SYSTEM: BARBADOS, BELIZE AND GUYANA



of Jamaica [1994] 2 A.C. 1. The CCJ in Joseph and Boyce denied the appeal, and the life sentences imposed by the Barbados Court of Appeal were affirmed.

⁵² (n.23.)

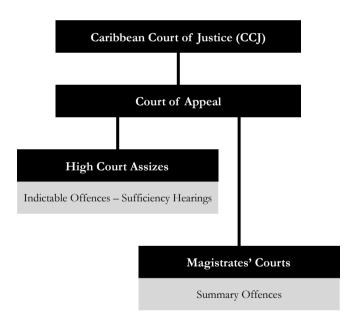
⁵³ (n. 22.)

⁵⁴ In any event the first president of the court, De La Bastide, J.C.C.J. could hardly be described as a champion of the death penalty, having delivered a strong judgement in *Joseph and Boyce* (n.51) in the Caribbean Court of Justice.

While this structure is arguably preferable to that which currently exists, in that the Privy Council is replaced as the final court of appeal, it is possible that it does not meet the challenges set by the soaring crime rates described *ante*.

What is required is not merely the replacement of the Privy Council, which by unhappy coincidence of history was formed at the time slavery was abolished and is perhaps not the ideal vehicle from the viewpoint of history and culture, it being associated so closely in time with slavery itself, 55 to pronounce on punishment including the death penalty for Commonwealth Caribbean citizens many of whom are the descendants of slaves, but a complete overhaul of the criminal justice system to allow for expedition such as that being undertaken in St Lucia and Antigua and soon to be attempted in Trinidad and Tobago as has been described above. Such a court structure will resemble that which is contained in the following diagram.

PROPOSED CARIBBEAN CRIMINAL COURT SYSTEM



If Commonwealth Caribbean states remain wedded to the idea that the Privy Council is the ideal vehicle for dispensing justice to

⁵⁵ It is not here suggested that the Privy Council has been an imperialistic Court. Few will argue that the decisions of the Privy Council in fact have served to enhance individual rights in the Commonwealth Caribbean. The argument is purely one of symbolism.

them notwithstanding the arguments set out by Sir Shridath Ramphal⁵⁶ then, at the minimum, it is time to move away from a structure which now quite obviously causes gridlock in the criminal justice system, to a more modern one which allows for the swift dispensation of justice along the lines of the structure now being attempted in Antigua and Barbuda, St Lucia and Trinidad and Tobago. Such a structure will resemble the proposed structure (depicted *ante*), save that the Privy Council would be retained in the place of the Caribbean Court of Justice.

V. OPPORTUNITIES FOR OVERSEAS LAWYERS TO PRACTISE LAW IN THE COMMONWEALTH CARIBBEAN

There is a fused legal profession in the Commonwealth Caribbean. Attorneys-at-law are admitted to practise once they have completed the Certificate of Legal Education from one of the Caribbean's three law schools. One is located in Jamaica (the Norman Manley Law School), another in the Bahamas (the Eugene Dupuch Law School), and the third is in Trinidad and Tobago (the Sir Hugh Wooding Law School). By virtue of the Council of Legal Education Treaty, entry to the law schools is automatic for holders of an LL.B. awarded by the University of the West Indies. In the case of persons who hold an LL.B. other than from the University of the West Indies, an entrance examination must be taken to determine eligibility for entry to the law schools.

Where a person is eligible to practise in any part of the Commonwealth or the United States, special permission to do a conversion course that includes Commonwealth Caribbean constitutional law must be sought from the law schools. The conversion course is a six-month course with no final examination. Upon successful completion of the conversion course, a person may practise in any Commonwealth Caribbean country that is a party to the treaty after arranging for formal call to the bar of the respective territory. Further information can be obtained from any of the law schools.

VI. CONCLUSION

The constitutions in the Commonwealth Caribbean define the people of the Caribbean. While they are amenable to change and amendment, they also contain and provide for values and principles which are fundamental and immutable. This is the context through which one must view the rulings of our final courts on legislation which, while it might be expedient (such as the setting up of special gun courts in Jamaica to treat the pressing problem of gun related homicides, or the

⁵⁶ (n.48).

curtailment of bail in Trinidad and Tobago to treat the pressing problem of offenders who repeatedly offend whilst on bail for another offence), violate constitutionally entrenched principles. Other pieces of legislation, such as the reforms called forth by international bodies such as the FATF to treat the problem of cross-border international financial crime, might equally not pass the test of what the courts (as guardians of the Constitutions that protect citizens of the region) deem to be immutable, and so they are impermissible intrusions into the rights to individual liberty of Caribbean citizens.

Interestingly, the reforms to our *justice system* as a whole that have been proposed thus far have met the constitutional test of immutable values⁵⁷.

As many of the island states that comprise the Commonwealth Caribbean reach the landmark of fifty years of independence, it is hoped that reforms to the justice system which are meaningful can be pursued at the expense of reforms which might meet the demands of short term political expediency, such as the curtailment of rights to bail and the abridgement of the right of the individual to property. It is submitted that the latter are not reforms to the *system of justice*, but short-term measures which have as their focus an influence on individual behaviour ,but at the unacceptable cost of the curtailment of individual rights.

⁵⁷ Humphreys v. Att.-Gen. of Antigua and Barbuda (n.44).

CASE NOTES

EXTRADITION FOR WAR CRIMES

Minister for Home Affairs (Cth) and others v. Zentai and others [2012] HCA 28, (2012) 289 A.L.R. 644 (August 15, 2012) High Court of Australia

extradition - surrender determination - war crime

A. Introduction

Justice Dyson Heydon appears well on his way to challenging Michael Kirby's mantle as the biggest outsider in the history of the High Court of Australia.¹ His dissent rate has been recorded as 45 per cent in 2011, just shy of Kirby's 48.3 per cent in 2006, and he currently sits on a dissent rate of 22 per cent for 2012.² When he retires in March 2013, along with an unparalleled legacy, Justice Heydon will leave behind a fearless pragmatism most recently demonstrated in his dissenting judgment in *Minister for Home Affairs (Cth) and others v Zentai and others*.³ In his opening remarks, Justice Heydon boldly went where the majority,⁴ for whatever reason, appeared very reluctant to go: -

"Counsel for the first respondent referred to the 'general antipathy in international law ... against retrospectivity' – an antipathy which can be somewhat selectively displayed. Analysis should not be diverted by that antipathy in this case. Nor should analysis be diverted by the characteristic vagueness with which war crimes are defined. Finally, analysis should not be diverted by reflections upon the zeal with which the victors at the end of the Second World War punished the defeated for war crimes. The victors were animated by the ideals of the Atlantic Charter and of the United Nations. The Universal Declaration of Human Rights was about to peep over the eastern horizon. But first, they wanted to have a little hanging." 5

Since a warrant was issued for his arrest in 2005, Australian citizen Charles Zentai has mounted several challenges against his extradition

¹ Michael Pelly, "Heydon The Great Loner pens his legacy", *The Australian* (Sydney, October 19, 2012), 29. See also Peter Fitzgerald's case note on *Burns v. The Queen*, at p.353 of this issue of the JCCL.

ibid...

³ Zentai [2012] HCA 28, (2012) 289 A.L.R. 644.

⁴ French CJ., Gummow, Crennan, Kiefel and Bell JJ.

⁵ Zentai (n.3), [75].

to the Republic of Hungary for an alleged war crime. The High Court of Australia's decision in *Zentai* is considered the end of the road for Hungary's quest to extradite him and for some, is "a very sad end to the abysmal failure of the Australian government to bring war criminals to justice".⁶ This case note considers the decision after outlining the background to the extradition litigation.

B. Background

On March 3, 2005, the Military Division of the Metropolitan Court of Budapest issued an arrest warrant for Zentai who resides in Western Australia. On March 23, 2005, the Republic of Hungary wrote to Australia requesting the extradition of Zentai for the purposes of his prosecution for the offence of "war crime". The warrant alleged that on November 8, 1944, while stationed in Budapest as a member of the Hungarian Royal Army, Zentai recognised Peter Balazs, a young man of Jewish origin who was not wearing a mandatory yellow star. Zentai was alleged with others to have dragged Balazs to an army post, beaten him to death and then to have thrown his body weighted with ballast into the Danube river. At the time of the alleged offence, there was no offence of "war crime" on the Hungarian statute book but the offence of murder did exist. The offence of committing a "war crime" only came into existence under Hungarian law in 1945.

On July 8, 2005, acting under section 16 of the Extradition Act 1988 (Cth) ("the Act"), the former Minister for Justice and Customs for Australia, acting as the delegate of the Attorney-General, issued a notice confirming receipt of the extradition request. By section 16(2), the Attorney-General may not issue such a notice unless of the opinion that the person whose extradition is sought is an "extraditable person" in relation to the requesting country. The existence of such a notice is a condition precedent to the conduct of proceedings under section 19 to determine the person's "eligibility" for extradition. On the same day, a magistrate issued a provisional arrest warrant for Zentai under section 12 of the Act, who was arrested and granted bail. On August 20, 2008, a magistrate determined, pursuant to section 19, that Zentai was eligible for extradition and issued a warrant committing him to prison. Prior to this, Zentai had unsuccessfully challenged the validity of the conferral upon state magistrates of the power to determine eligibility for surrender under section 19. The challenge failed at first instance in the Federal Court,7 on appeal to the Full Court8 and on further appeal to the High Court of Australia.9

⁶ Efraim Zuroff, Director of the Simon Wiesenthal Centre (Jerusalem) as quoted in Paige Taylor and Nicholas Perpitch, "War crime case is halted", *The Australian* (Sydney, August 16, 2012), 11.

Zentai v. Republic of Hungary [2006] FCA 1226, (2006) 153 F.C.R. 104.

Zentai applied, under section 21, to the Federal Court for a review of the magistrate's section 19 determination. The magistrate's determination was affirmed by the Federal Court¹⁰ and Zentai's subsequent appeal to the Full Federal Court against that decision was dismissed on October 8, 2009.11 Section 11(1) of the Act provides that regulations may provide that it applies in relation to a specified extradition country (Hungary is such a country) subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty in relation to the country. Zentai's argument (ultimately successful in the decision the subject of this note) was that there was such a limitation in the relevant treaty, that the relevant regulations gave effect to that limitation, and that it was incumbent on the magistrate, at the eligibility hearing, to take account of such limitation in deciding whether he was "eligible" for extradition. It was held that the magistrate's function, under the Act, Any limitation on the scope of the Act did not extend thus far. introduced by the particular treaty would only come into the reckoning at a later stage (or, possibly, at an earlier stage by way of judicial review of the Attorney-General's decision to issue a notice under section 16).

On November 12, 2009, the Minister for Home Affairs determined, pursuant to section 22(2), that Zentai was to be surrendered to the Republic of Hungary. Section 22 requires the minister to determine as soon as is reasonably practicable after a person becomes an "eligible person" whether the person is to be surrendered in relation to a qualifying extradition offence. It is at this stage that section 11 is engaged because section 22(3)(e) stipulates that an eligible person is only to be surrendered in respect of an extradition offence where the Attorney-General is satisfied as to the non-existence of any relevant limitation having effect by virtue of regulations under that section.

The Extradition (Republic of Hungary) Regulations (1997) (Cth) declare the Republic of Hungary to be an extradition country and provide that the Act applies in relation to that country subject to the Treaty on Extradition between Australia and the Republic of Hungary ("the Treaty") set out in the schedule to the regulations. Article 2.5(a) states that extradition may be granted irrespective of when the offence in relation to which extradition is sought was committed,

⁸ Zentai v. Republic of Hungary [2007] FCAFC 48, (2007)157 F.C.R. 585.

⁹ The respondent's challenge was heard concurrently with two other matters: O'Donoghue v. Ireland; Zentai v. Republic of Hungary; Williams v. United States of America [2008] HCA 14; (2008) 234 C.L.R. 599.

¹⁰ Zentai v. Republic of Hungary [2009] FCA 284.

¹¹ Zentai v. Republic of Hungary [2009] FCAFC 139, (2009) 180 F.C.R. 225.

¹² Regulation 4 of, and Schedule to, the Extradition (Republic of Hungary) Regulations 1997 (Cth) (S.R. 1997 No. 60), Treaty on Extradition between Australia and the Republic of Hungary.

provided that "it was an offence in the Requesting State at the time of the acts or omissions constituting the offence."

Zentai challenged the minister's section 22 determination in the Federal Court. At first instance, the court found it had not been open to the minister to surrender Zentai because "war crime" was not an offence in Hungary at the time the acts alleged to constitute it were committed.¹³ This time, it was the minister who appealed to the Full Federal Court which varied the primary judge's orders but otherwise dismissed the appeal. A majority of the court concluded that the judge had been correct in holding that the offence for which extradition was sought must have been an offence under Hungarian law at the time of the acts alleged to constitute it. The minister appealed to the High Court of Australia.

C. Appeal to the High Court of Australia

At issue was the proper interpretation of the Act and the Treaty and whether the minister was empowered to comply with the request for extradition. Of particular relevance were Articles 2.2 and 2.5 of the Treaty, which state: -

- **"2.2.** For the purpose of this Article in determining whether an offence is an offence against the law of both Contracting States:
 - (a) it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;
 - (b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Contracting States, the constituent elements of the offence differ.
- **2.5.** Extradition may be granted pursuant to the provisions of this Treaty irrespective of when the offence in relation to which extradition is sought was committed, provided that:
 - (a) it was an offence in the Requesting State at the time of the acts or omissions constituting the offence; and
 - (b) the acts or omissions alleged would, if they had taken place in the territory of the Requested State at the time of the making of the request for extradition, have constituted an offence against the law in force in that State."

¹³ Zentai v. O'Connor (No. 3) [2010] FCA 691, (2010) 270 A.L.R. 293.

Whilst not unanimous in their reasoning, the majority¹⁴ dismissed the minister's appeal concluding he was precluded from surrendering Zentai unless he was satisfied that the offence of "war crime" was an offence against the laws of the Republic of Hungary as at November 8, 1944. French C.J. concluded that the Treaty, and in particular Article 2.5(a), should be interpreted in light of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, unconstrained by technical rules of construction and taking into account all relevant facts as a whole.¹⁵ Applying this approach, His Honour stated:

"As a matter of ordinary grammatical construction, the proviso in Article 2.5(a) of the treaty requires that the 'offence in relation to which extradition is sought' was an offence in the requesting state at the time of the acts or omissions said to constitute the offence." ¹⁶

His Honour rejected a submission by the minister that the term "the offence in relation to which extradition is sought" is to be read by reference to Article 2.2 of the treaty as meaning the "acts or omissions constituting the offence"-

"The request for the extradition of the respondent for commission of a war crime cannot rest simply upon the proposition that the alleged conduct would have constituted the offence of murder under Hungarian law in 1944."

The minister had submitted that Australia and the Republic of Hungary had entered into a "subsequent agreement" regarding the correct interpretation of Article 2.5(a) of the Treaty: such agreement was effectively to be implied from the nature of the Hungarian request and the fact of it having been acted upon by Australia. This agreement, it was contended, should have been given effect pursuant to Article 31(3) of the Vienna Convention, which requires that account be taken, in interpreting a treaty, of any subsequent agreement of the parties regarding its interpretation or the application of its provisions.¹⁸ A departmental submission advising the minister that the "conduct-based" interpretation of Article 2.5(a) appeared to be consistent with the view of the Hungarian Government was said to reflect this "subsequent agreement". His Honour dismissed this argument concluding that, as a matter of domestic law, the Treaty was to be interpreted in the light of its text, context and purpose as at the time of the 1997 regulations; any subsequent agreement which had the effect of varying the terms of the Treaty would not affect the

¹⁴ French C.J. and Gummow, Crennan, Kiefel and Bell JJ.

¹⁵ Zentai (n.3), [18], [19].

¹⁶ *ibid.*, [30].

¹⁷ *ibid.*, [32].

¹⁸ *ibid.*, [35].

application of the Act unless section 11 were enlivened by way of a further regulation or some other statutory means.¹⁹

Reaching the same conclusion as French C.J., the majority²⁰ differed in its reasoning. They noted that Article 2.5(a) embodies a general objection to retrospectively applied criminal law recognised both domestically and internationally including Article 7 of the *European Convention on Human Rights*.²¹ They concluded that ordinary principles of statutory interpretation are to be applied to the treaty and that its proper interpretation cannot be altered by some common understanding between the parties thereto.²²

The majority considered section 22(3)(e) of the Act which, in this case, precluded the surrender of the respondent unless the minister was satisfied of the existence of the circumstance stated in Article 2.5(a) of the Treaty.²³ They discussed the interplay between section 22(3)(e) and the regulations made under section 11(1) annexing the Treaty, and confirmed that the meaning of the limitation in Article 2.5(a) is to be interpreted by applying ordinary principles of statutory interpretation.²⁴ Their conclusion was that Article 2.5(a) required the minister to direct attention to whether the acts or omissions particularised in the request constituted the offence for which extradition was sought and not to whether the acts or omissions particularised in the request were capable of giving rise to any form of criminal liability under the laws of the requesting state at the time they occurred. They accordingly held that the minister was precluded from surrendering Zentai unless he was satisfied that the offence of "war crime" was an offence against Hungarian law in November, 1944.25

In stark contrast to what, it is submitted, was a somewhat literalist approach of the majority, Heydon J.'s approach to the interpretation of the Treaty was purposive and compelling. His Honour's judgment must rank as one of the most remarkable judgments ever delivered by a Commonwealth judge. Hard on the heels of his opening paragraph quoted at the beginning of this note, came this:

"In 1946 the Allies hanged the former German Foreign Minister for crimes against peace. No doubt he was an

¹⁹ ibid., [36].

²⁰ Gummow, Crennan, Kiefel and Bell JJ.

²¹ Citing (at [60]) Polyukhovich v. Commonwealth [1991] HCA 32; (1991) 172 C.L.R. 501, 609-12 (Deane J.), 642-3 (Dawson J.), 686-90 (Toohey J); Lipohar v. R. [1999] HCA 65, (1999) 200 C.L.R. 485, [142] (Kirby J.); Haskins v. Commonwealth [2011] HCA 28, (2011) 244 C.L.R. 22, [72] (Heydon J.); and R. v. Miah [1974] 1 W.L.R. 683 (House of Lords), 694 (Lord Reid).

²² Zentai (n.3), [65].

²³ ibid., [61].

²⁴ *ibid.*, [65].

²⁵ *ibid.*, [72].

unlovely character. No doubt other things that he may have done were repellent. But critics find the way he was forced to the scaffold unattractive because the existence of crimes against peace before 1945 was at best questionable. They also find it unattractive because the prosecution comprised four countries with very large empires, significant parts of which had been acquired by starting wars. That was an example of behaviour which gave war crimes trials a bad name."²⁶

From this, it might have been thought that his Honour would have little truck with an extradition request for "war crime". Indeed, his Honour points out that the Hungarian decree of 1945 that created the offence of war crime provided for three categories of offender, saying of the first two that they are "replete with indeterminate and uncertain phrases."27 The third category, however, referred to "an instigator, perpetrator or accomplice of the unlawful execution or torture of persons", and the case against the respondent put him in this category. His Honour then recited the factual allegation against the respondent, including that, whilst on patrol, he had dragged the victim from the street to his unit's army post where, with two accomplices, he had "assaulted" the victim so badly that he died of his injuries, whereupon the respondent attached ballast to the body which was then disposed of in the Danube. Having acknowledged that the 1945 decree purported to be retrospective in effect, his Honour pointed out that this was more apparent than real in the context, at least, of allegations within the third category because it required antecedently "unlawful" conduct, which, in this case, was murder.

Directing his attention then to Article 2.5 of the Treaty, his Honour was of the opinion that the use of the word "offence" where it first appears was intended to refer to the factual elements of the alleged offence. The key elements alleged were intentional assault on another leading to that person's death, which would have fallen within the third category of the war crime decree of 1945 and which would have been murder in 1944. Therefore, he concluded, "the offence in relation to which extradition is sought" was an offence in Hungary in 1994, as required by Article 2.5(a). It was not necessary that the named offence, "war crime" should have existed in Hungarian law in 1944; it was sufficient that the alleged acts which Hungary contended amounted to the named offence constituted an existing offence in 1944, even if it had a different name.²⁸

²⁶ *ibid.*, [79].

²⁷ *ibid.*, [76].

²⁸ *ibid.*, [84].

His Honour recognised that it was possible to mount an argument based on the language of the Treaty that led to a different conclusion. However, he continued:

"So far as that type of reasoning has merit, its merit certainly depends on context. The present context concerns a bilateral treaty entered by Australia and Hungary and negotiated by State representatives who, most probably, did not share fluency in a common language. It is true that the drafting might have been better adapted to achieve the result for which the appellants contend. But that fact does not negate the conclusion that the drafting actually employed achieved that result."²⁹

D. Concluding comments

The High Court's decision, which may be seen as a victory of a black-letter legal literalism over substantive justice, does not exonerate Zentai. A criminal trial would have been the only mechanism by which justice would have been served. There is nothing which technically precludes the Republic of Hungary issuing a fresh arrest warrant and extradition request seeking the extradition of Zentai in relation to the offence of "murder" rather than "war crime". It remains to be seen whether the Republic of Hungary will determine this to be an appropriate course of action. The family of Peter Balazs, who may never receive closure now, and to whom it would have mattered not what label was to be attached to the brutality to which he was subjected on that evening in November, 1944, must be wondering why it did not take that course in the first place. Had it done so, legal opinion seems to be united in the view that Zentai would have been unable to resist his extradition.

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²⁹ *ibid.*, [90].

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THE PRIVY COUNCIL AND THE CARIBBEAN COMMONWEALTH STATES

Hamilton v. The Queen [2012] UKPC 31, [2012] 1 W.L.R. 2875 (August 16, 2012)

Hamilton v. The Queen [2012] UKPC 37 (October 25, 2012) Judicial Committee of the Privy Council

delay – admissions and confessions – Jamaica

The Jurisdiction Spotlight in this issue of the journal examines the current issues pertaining to the criminal justice systems of the Caribbean. One of them, John S. Jeremie writes, is the role of the Privy Council as the Caribbean's final appellate court. In 2005 the Caribbean Court of Justice was created to hear cases that would previously have gone before the Judicial Committee of the Privy Council, but to date only Barbados, Belize and Guyana have incorporated it into their court systems. This is despite an increasingly strained relationship between the Privy Council and the Caribbean Commonwealth States,1 and despite the call by Lord Phillips in 2009 (shortly before he was made President of the Supreme Court of the United Kingdom) for Commonwealth countries to stop using the Privy Council, and to set up their own final courts of appeal instead, because Law Lords were spending a "disproportionate" amount of time on cases from former colonies, mostly the Caribbean.² The case of Hamilton provides a clear example of the need for final appellate courts to have a proper understanding of the cultural context of the cases they hear. It is wide open to question whether the Privy Council fulfils that need.

A. The application for permission to appeal

In April 2001 the applicants, Carlos Hamilton and Jason Lewis, were convicted of murder. They were sentenced to life imprisonment with a minimum period of 25 years. The Court of Appeal of Jamaica refused their application for leave to appeal against their convictions

See Deborah Colbran Espada's case note discussing this issue at [2011] J.C.C.L. 151.

These comments were made in an interview by Lord Phillips for the Financial Times. The article is only available to subscribers but can be accessed via the Supreme Court's website at http://ukscblog.com/lord-phillips-complains-about-the-privy-council accessed November 20, 2012. For non-subscribers there is a summary in a report on the BBC website: http://www.bbc.co.uk/caribbean/news/story/2009/09/09/929_privyccjphillips.shtml accessed November 20, 2012.

and sentences in March, 2003. In July, 2003 they contacted a solicitor in England who coordinates the Jamaican Pro Bono Panel which is responsible for the representation of Jamaican capital prisoners who want to apply for special leave to appeal to the Privy Council, and sought *pro bono* assistance for their applications for permission to appeal to the Judicial Committee of the Privy Council. That solicitor only went on to appoint a firm of solicitors to act for them in April, 2010 and their application for permission to appeal was eventually lodged in July 2011, eight years and four months after the Court of Appeal of Jamaica had made its decision.

The applicants were undoubtedly in breach of rule 11(2) in Schedule 1 to the *Judicial Committee (Appellate Jurisdiction) Rules Order* 2009 (S.I. 2009 No. 224) ("the 2009 rules") which provides that "(2) An application for permission to appeal must be filed within 56 days from the date of the order or decision of the court below or the date of the court below refusing permission to appeal (if later)." Under rule 5(1) in Schedule 1 to the 2009 rules, the registrar has the power to extend or shorten that period of time. If an extension is granted, this does not preclude the respondent from objecting to the grant of permission on the ground that the application was made out of time. If an objection is made, the matter will be referred to the Judicial Committee.

The fairly shocking length of the delay in Hamilton is all too common in appeals from the Caribbean. Giving the judgment on the application for permission, Lord Hope identified a number of reasons for this.3 First, given that criminal legal aid in Jamaica, and indeed most, if not all, Caribbean states is very limited at best, and theoretical at worst, most prisoners must rely on pro bono assistance from either local or English lawyers. Secondly, there are problems Prisoners in Jamaica have no access to with communication. landline telephones, mobile telephones are generally believed to be contraband items, and letters sent to and from prisons can take months to reach the addressee or they can simply go missing. Thirdly, there is no published appeal procedure for prisoners to consult and the appeal process is entirely prisoner driven. Unless a prisoner makes inquiries about his appeal rights, he will not be informed of them. The court said that it had no reason to believe that the situation was different in Jamaica to the rest of the Caribbean states.

In a letter to the board, the solicitors for the prosecuting authorities in *Hamilton* suggested that such lengthy delays could be avoided if "the correct procedure" is followed *i.e.* that the

³ At [5-10].

⁴ At [11].

prosecution and the prison authorities are informed of a prisoner's intention to apply for permission to appeal to the Judicial Committee as soon as he has indicated that intention. In Hamilton, the authorities were informed just one week before the application was eventually made in July, 2011. By knowing in advance, the prosecuting authorities argued that they would be able to assist with the progress of the appeal. There is nothing in the judgment to suggest where this "correct procedure" is laid down. Rule 12 of Schedule 1 to the 2009 rules provides that "Before the application is filed, a copy must be served on every respondent and, when the application is filed, the appellant must file a certificate of service." However, no time period is given for how soon a copy must be served before the application is filed. The solicitors for the prosecuting authorities further submitted that, in future cases, permission to appeal to the Judicial Committee out of time should only be granted where substantial and cogent reasons had been given to explain the delay.

An alternative view was put before the board in the form of oral submissions by counsel for the applicants in *Hamilton* and in letters written by solicitors who frequently act as agents in appeals to the Privy Council. They called for the need for a more generous approach given the real difficulties already identified by the court which lead to these delays. It was submitted that the board had never regarded delay as a critical factor in considering whether or not to grant permission to appeal and commended the flexible approach which the Privy Council already adopts in practice by balancing the problems with the need for expedition. Further, it was submitted that whilst it was clearly preferable that Privy Council agents should inform the prosecuting authorities of an intention to make an application as soon as they are instructed, there will still be cases where Privy Council agents are not instructed and where this cannot be done.

The board considered the 2009 rules and noted that they were drafted at the same time as the *Supreme Court Rules* 2009 (S.I. 2009 No. 1603) which were made to regulate practice in the Supreme Court of the United Kingdom. During the drafting process it was felt that a timetable for appeals to the Judicial Committee should be laid down, however the period allowed for filing applications would be doubled as compared to the time allowed for the Supreme Court, from 28 days to 56 days.⁵ The board's attitude to this time frame is rather conflicting. Giving the judgment, Lord Hope says:

⁵ See r.11(2) of the 2009 rules (ante).

"On the whole the setting of a time limit has proved to be salutary, and for the most part it has not given rise to difficulty. Nevertheless it remains commonplace in the case of criminal appeals coming before the board from jurisdictions in the Caribbean for periods of years rather than days to elapse before the application is made. ... In no case have applications for permission to appeal from these jurisdictions been lodged within the time limit set by rule 11(2) or, indeed, anywhere near the period of days set by that time limit."

This is hardly surprising. As Lord Hope comments earlier in the ruling, before the 2009 rules were brought into force, delays in cases of capital murder varied from five months to four years and six months and, occasionally, much longer, and in non-capital cases the delays were always much longer, sometimes in excess of ten years.

The board in Hamilton said that whilst it had no intention of "departing from the direction" in rule 11(2), and whilst restricting access to the courts by the imposition of time limits is not incompatible with the European Convention on Human Rights, "the question will always be whether, having regard to all the circumstances, it is in the interests of justice that the time limit should be extended."8 The board said that whilst cases coming before it from the Caribbean "are exceptional", the same principle would apply, but that it would be sympathetic to those sentenced to death or long periods of imprisonment who are relying on legal services pro However, it also held that prosecuting authorities should be notified as quickly as possible of a prisoner's intention to apply for permission to appeal to the Judicial Committee, that a copy of the notification should be available for production to the registrar when the application is lodged, and that steps should be taken to inform those who act as Privy Council agents for the state concerned. board granted permission to appeal.

B. The substantive decision

A number of grounds of appeal were put before the Privy Council in *Hamilton*, but the most interesting related to a failure to admit into evidence the oral and written statements made by the appellant, Hamilton, during interviews with the police.

The appellants, Hamilton and Lewis, were alleged to have murdered their neighbour by chopping him to death with a machete early one morning. On the evening of the killing, Hamilton went to

⁶ At [4].

⁷ At [15].

⁸ At [16].

the local police station and told a police officer "A defend me a defend myself. Mi never mean fi kill him." After being cautioned, Hamilton said "Min uh chop nobody, boss." He also said that himself and the deceased were alone at the time. Five days after his arrest, Hamilton made a written statement under caution in the presence of two police officers which he signed. In it he said that he had known the deceased since they were youths. The deceased had hit him with a stone when he was 13 and the incident had been reported to the police. The deceased had then gone on to bully him on more than one occasion and made him "fraid bad." months before the killing, the deceased had "jucked" at him with a pointed cutlass and Hamilton had thrown two stones at him in That incident had also been reported to the police. Finally, he said that the night before the killing the deceased had thrown a stone at his head which knocked him unconscious. In an unsworn statement at trial, Hamilton said that on the morning of the killing he had been moulding a banana tree root with his cutlass. The deceased appeared and walked towards him with a machete

"I ketch yuh rass now, this time you alone." Believing that the deceased had come there to kill him, Hamilton had started to chop him

The prosecution did not put the written statement made under caution to the police in evidence. The Privy Council noted that it was a "mixed statement" given that it contained both inculpatory and exculpatory statements, and that, if the prosecution had adduced it, it would have been admissible as to the truth of its contents. However, the evidence had been ruled inadmissible at an earlier abortive trial presided over by the Chief Justice of Jamaica on the basis that it was a self-serving statement. Given that ruling and the indication by the trial judge, counsel for the appellants had tried to elicit more of what was said to the police by Hamilton during cross-examination of the investigating officer at trial. The trial judge had ruled that what was said to the police officer was inadmissible as "self-serving" and "also hearsay".

The Privy Council considered the English case of R. v. Pearce¹⁰ in which it was held that a statement that is not an admission is admissible to show the attitude of the accused at the time when he made it.¹¹ Thus, Sir Anthony Hooper, giving the judgment of the board, ruled that what Hamilton said to the police orally and in his written statement was admissible to show his attitude when he gave

⁹ R. v. Sharp (Colin) [1988] 1 W.L.R. 7, H.L.

¹⁰ 69 Cr.App.R. 365, C.A.

¹¹ *ibid.*, [369].

himself up to the police on the evening of the killing. Sir Anthony said:

"In our view the court in *Pearce* correctly identified an exception to the common law rule making self-serving statements inadmissible. The modern practice of case management puts an emphasis on the defendant disclosing as early as possible the nature of his or her defence. The defendant when cautioned at common law is asked for his account and is told that anything he says may be given in evidence ... Entitling defendants to put into evidence what they say at the time of arrest, if the prosecution choose not to do so, should encourage defendants to give their account of the events at the earliest opportunity. This is particularly important, where, as in this case, there is such substantial delay between arrest and trial."

Despite finding that what Hamilton said to the police should have been admitted, that there had been a misdirection to the jury on the issue of provocation, and that counsel had failed to adduce the good character of the appellants, the board managed to uphold the convictions. In relation to the wrongful exclusion of evidence, the board held that the jury knew that Hamilton had claimed from the outset to have acted in self-defence and had heard about the deceased's alleged behaviour towards him. As Hamilton did not give evidence, the board also noted that the judge would have been entitled to tell the jury, had the evidence been admitted, that the prosecution had had no opportunity to cross-examine Hamilton about it. As a result, the board concluded that the jury would inevitably have come to the same conclusion if the evidence had been admitted.

C. Comment

The board notes in its decision on the application for permission to appeal that the 2009 rules are based on those drafted for the Supreme Court of the United Kingdom. It goes on to acknowledge that 56 days to lodge an application to appeal from the date of the decision of the court below is an impossible time frame for prisoners from the Caribbean to comply with, and it accepts that there are inherent problems relating to legal aid, the reliance on *pro bono* representation and communications across the Caribbean which currently make substantial delays an inevitability. However, the only suggestion made by the board to tackle these issues is that the prosecuting authorities should indeed be notified of a prisoner's intention to apply for permission to appeal promptly, despite there being clear evidence before it, presented by those who undertake such *pro bono* work regularly, that that is impossible. If the prosecuting authorities really

want to help to reduce the hefty delays that appellants to the Privy Council have to endure, perhaps it would be advisable for them to prepare a document setting out appeal rights and possible sources of assistance to be given to every prisoner sentenced to a custodial sentence. With that in place, they might then get the early notification they wish for.

In the substantive judgment, Sir Anthony Hooper refers to "the modern day practice of case management" when considering the admissibility of early statements made by defendants to the police. Case management might be a hefty concern for the jurisdiction from which he comes, but it is certainly not a burning issue in the Caribbean courts. It is submitted that the Privy Council's reasoning in this case is planted too firmly in the principles that matter in the courts of England and Wales and the Supreme Court of the United Kingdom. It is perhaps surprising that 11 out of the 14 Caribbean Commonwealth States are content to allow their cases to be dictated by a group of judges who are so far removed from the issues that come before them. This is particularly so when Lord Phillips has made it clear that the view from the Supreme Court of the United Kingdom is that senior judges would be better off spending their time not dealing with cases from former colonies, and particularly the Caribbean.

The website¹² for the Caribbean Court of Justice says that its vision is:

"To provide for the Caribbean Community an accessible, fair, efficient, innovative and impartial justice system built on a jurisprudence reflective of our history, values and traditions while maintaining an inspirational, independent institution worthy of emulation by the courts of the region and the trust and confidence of its people."

Only time will tell whether or not that vision can be realised, but for now cases such as *Hamilton* suggest that the legislators, judiciary, legal profession and defendants of the Caribbean Commonwealth States need to look elsewhere than the Privy Council if that is what they want from their highest appellate court.

LYDIA WAINE.*

¹² < http://www.caribbeancourtofjustice.org/about-the-ccj/mission-vision accessed November 20, 2012.

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A FUNCTIONAL APPROACH TO MISCONDUCT IN PUBLIC OFFICE

HKSAR v. Wong Lin Kay (2012) FACC No. 3 of 2011, [2012] 2 H.K.L.R.D. 898 Court of Final Appeal, Hong Kong S.A.R. (April 2, 2012)

misconduct in public office – definition of "public office"

In Wong Lin Kay, the Court of Final Appeal considered whether a truck driver, employed by the government, who continues to drive without disclosing to his employer that he has been convicted of driving offences committed other than in the course of his employment and also whilst disqualified from driving, may thereby be liable for the common law offence of misconduct in public office ("the offence of misconduct"). The certified question for the court concerned the definition of "public official" as an element of the offence of misconduct, and required the court specifically to determine whether Wong, the truck driver, was a "public official".

Eschewing a status-based test, that is, one which looks primarily at whether a person "holds a public office", the court instead adopted a "functional" test, with the focus on whether a person is invested with powers and duties of a public nature, in the discharge of which the public is interested. Applied to *Wong*, the court unsurprisingly concluded that *Wong* was not a "public official", and, accordingly, was not liable therefore for the offence of misconduct.

A. The common law offence of misconduct in public office

Described in Wong as an "integrity offence" ([at 15]), the offence of misconduct is, like its companion, the common law offence of bribery, of considerable antiquity. In some common law jurisdictions, it has been superseded by a statutory version, but in others, including England, some Australian states, the United States and Hong Kong, it remains part of the common law, standing alongside more specific statutory offences of corruption and bribery. The offence of misconduct criminalises the conduct of those holding "public office", or "public officials", who abuse the powers, duties or responsibilities entrusted to, or vested in, them either at common law or by statute, and exercisable in the public interest. The misconduct may be by act, or omission; it may arise in the course of carrying out public office, or "in relation to" such public office; this latter expression captures misconduct committed not in the course of carrying out public office, but which brings that office into disrepute.

The misconduct must be "wilful", and in some instances, may have to be actuated by dishonest, corrupt or other improper motives. The public office in question may be unremunerated, as was recently confirmed in R. v. Belton [2010] EWCA Crim. 2857, [2011] Q.B. 934.

However, until the last few decades of the twentieth century, the common law offence was rarely prosecuted and, in the words of Professor Paul Finn in a short commentary in the late 1970s entitled "Public Officers: Some Personal Liabilities" (1977) 51 A.L.J. 313, one of several such commentaries by him at that time, the offence was in danger of "passing into oblivion". Professor Finn described the "kernel" of the common law offence as being "an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position." But in so describing the offence, Professor Finn also acknowledged that the long-standing body of law concerning the common law offence "is often obscure. Often ill defined. Its central difficulty lies in the question, to whom does it apply? Who is a public officer?"

In the ensuing three decades, the offence of misconduct has been re-invigorated. Amongst various explanations for this revival, two identified by the authors of one leading English text (Colin Nicholls Q.C., Timothy Daniel, Alan Bacarese & John Hatchard, *Corruption and Misuse of Public Office* (2nd edn, Oxford University Press 2011), 154), are its ability to reflect a course of conduct in a single charge, and its ability to reflect "truly criminal" conduct which cannot be satisfactorily charged as any other offence.

B. Misconduct in public office in Hong Kong

In Hong Kong, the offence of misconduct has become a favoured charge of Hong Kong's dedicated anti-corruption agency, the Independent Commission Against Corruption ("ICAC"). The offence has been used to prosecute a variety of persons holding "public office", including civil servants and police officers, who have allegedly "misconducted" themselves in ways which do not clearly involve the offer, solicitation or payment of bribes, and thus fall outside the already broad reach of Hong Kong's existing statutory bribery offences.

Given its common law origins and the uncertainty about its elements and scope, various constitutionally based challenges have been made to the validity of the offence in Hong Kong. The offence has largely withstood such challenges, but along the way it has undergone judicial reformulation and refinement of its elements in an attempt to make the offence sufficiently precise to pass constitutional scrutiny. Prior to *Wong*, the Court of Final Appeal was twice asked to review the validity of the offence of misconduct, first in *HKSAR v*.

Shum Kwok Sher (2002) 5 H.K.C.F.A.R. 381, and then, three years later, in Sin Kam-wah v. HKSAR (2005) 8 H.K.C.F.A.R. 192.

1. HKSAR v. Shum Kwok Sher (2002)

In Shum the constitutional validity of the offence of misconduct was challenged on the grounds that it was too vague and uncertain to satisfy the principle of legal certainty. Rejecting this challenge, the Court of Final Appeal, after reviewing the offence's history and scope, affirmed the constitutional validity of the offence. In doing so, Sir Anthony Mason N.P.J., former Chief Justice of the High Court of Australia, sitting as a non-permanent judge of the court, reformulated the offence, identifying "public official" as the first of four elements. Drawing on Professor Finn's writing, Sir Anthony repeatedly used the language of "public office" in further elaborating the elements of the offence. Thus, speaking of the need for "serious misconduct", rather than mere disciplinary breaches, he stated (at [87]), "Whether it is serious misconduct in this context is to be determined having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities" (emphasis added). And again, in relation to the mens rea element of the offence, he stated (at [84]), "A public official culpably misconducts himself if he wilfully and intentionally neglects or fails to perform a duty to which he is subject by virtue of his office or employment without reasonable excuse or justification. A public official also culpably misconducts himself if, with an improper motive, he wilfully and intentionally exercises a power or discretion which he has by virtue of his office or employment without reasonable excuse or justification" (emphasis added).

In so doing, Sir Anthony understood that the meaning of "public office" was uncertain, but Shum was the Chief Property Manager of the Government Property Agency, and there was no issue about his qualifying as a "public official." "Just how far [public office] extends", stated Sir Anthony (at [99]), "may perhaps be a question for the future". Significantly, use of the term "employment" in addition to "office" suggested perhaps a wider scope for the offence than might have previously been thought acceptable.

2. Sin Kam-wah v. HKSAR (2005)

In *Sin*, its second major consideration of the offence of misconduct, the Court of Final Appeal, noting the then recent reconsideration and reformulation of the elements of the offence of misconduct under English law by the English Court of Appeal in *Att.-Gen.'s Reference (No. 3 of 2003)* ([2004] EWCA 868, [2005] Q.B. 73),

itself restated the elements of the offence under Hong Kong law. Sin was a Senior Superintendent in the Hong Kong Police Force, and, as in *Shum*, there was no issue as to his being a "public official". Whether a status or functional test was applied, Sin clearly qualified. Sin's misconduct allegedly lay in his acceptance of free sexual services from prostitutes provided by another defendant who was convicted on related charges of exercising control over other persons with a view to their prostitution, and of offering advantages to a government servant. Sir Anthony Mason N.P.J., again delivering the principal judgment of the court, expressly retained "public official" as the first element of the reformulated offence of misconduct:

"The offence is committed where: (1) a public official; (2) in the course of or in relation to his public office; (3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty; (4) without reasonable excuse or justification; and (5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities" (at [210-211], emphasis added).

As can be seen, the language of "public office" is repeated by Sir Anthony, as it was in *Shum*, in elaborating the necessary misconduct element, but its meaning was not directly in issue. As McWalters observed (in *Bribery and Corruption Law in Hong Kong* (2nd edn, LexisNexis 2009), 691), "the question whether [a person] need hold an office in order to be a public officer, and if so what is meant by "an office" still remains to be definitively answered by an appellate court in Hong Kong." In *Wong*, this issue finally came squarely before Hong Kong's highest appellate court.

C. HKSAR v. Wong Lin Kay (2012)

1. The facts

Wong was employed as a government driver in the Agriculture, Fisheries and Conservation Department of the Hong Kong Government. His duties were to drive other employees of the department to various places of work in Hong Kong's country parks, usually in a small truck. In March, 2009, Wong was convicted of driving a motor vehicle whilst he had a concentration of alcohol in his blood above the prescribed limit and was disqualified from driving for six months. The offence was not committed in the course of his employment, but he did not disclose the conviction to his employer and thereafter continued with his driving duties. When his conviction and disqualification were later discovered, Wong was

charged with, and convicted of, six offences of driving whilst disqualified. In addition, a single charge of misconduct in public office, contrary to common law was laid against Wong, essentially based on the fact he was a government employee, and had breached the duties owed by him as an employee to his employer. At trial, Wong was convicted on this latter charge, and sentenced to 15 months' imprisonment. That sentence was substantially greater than the term of six months' imprisonment concurrently imposed for the driving offences.

On appeal to the High Court, McMahon J. in the Court of First Instance (January 28, 2011, HCMA 633/2010) quashed Wong's conviction for the offence of misconduct, ruling that the offence of misconduct was not engaged, since Wong was "just a truck driver" and not a "public official". The government appealed to the Court of Final Appeal, pursuant to the following certified question: "What is the definition of 'public official' for the purposes of the common law offence of misconduct in public office?"

Before the Court of Final Appeal, counsel for the prosecution submitted (at [12]-[15]) that the appeal judge had erred by conflating the issue of whether someone is a "public officer", the first element of misconduct, with the question of what conduct amounts to relevant "misconduct". The question "who is a public officer?", it was submitted, is an independent question, standing apart from the other elements of the offence, and extends to, but is not restricted to, every government employee based on their "duty of loyalty" to their employer; and, in this case, Wong's employer was the HKSAR Government. "Misconduct", it was submitted, arises when a government employee commits a "serious breach" of this duty, which it was alleged Wong did by driving whilst disqualified and by concealing his disqualification. Such breaches, it was submitted. constitute "a breach of the public trust placed in civil servants that they will properly discharge their duties", and expose the employee to liability for the offence of misconduct.

2. The decision of the Court of Final Appeal

The Court of Final Appeal gave this argument short shrift. Rejecting the attempt to separate the question whether Wong was a "public official" from the question of what conduct amounts to relevant misconduct, Ribeiro P.J., delivering the principal judgment, responded (at [22]):

"The correct approach is ... not to attempt somehow to decide in the abstract or in isolation whether a person is or is not a 'public officer'. One must examine what, if any, powers, discretions or duties have been entrusted to the

defendant in his official position for the public benefit, asking how, if at all, the misconduct alleged involves an abuse of those powers in any of the ways identified in *Shum Kwok Sher*. If the defendant occupies a position which confers no such powers on him, he is not a candidate for prosecution for the offence, even if he is employed by a government department or by an analogous public body."

And (at [34]):

"Of course, in ordinary speech, every employee in the public sector might be termed a 'public officer'. However, for the purposes of determining who is potentially liable for misconduct in public office, the authorities examined above show that not every public employee is susceptible to such liability. His job may not vest him with any relevant powers or discretions to be exercised for the benefit of the public. The misconduct he is accused of may not involve any abuse of, or have any relevant relationship with, the official position which he occupies."

Ribeiro P.J. concluded (at [37]):

"[Wong] falls into the excluded category of government employees. He did not occupy a public office entrusting him with powers and discretions to be exercised for the public benefit; nor, it follows, did his misconduct consist of any abuse of such non-existent powers. He was, as the judge pointed out, simply a truck driver."

This conclusion also enabled the court to reject a claim that the offence of misconduct applied in an unequal or discriminatory manner by permitting the prosecution of a truck driver such as Wong employed in the public sector, but not his private sector equivalent. Since Wong was not a "public officer", he was not liable. "The right to equal treatment under the law," observed Ribeiro P.J. (at [36]), "highlights the public dimension of the offence. ... A public officer's potential liability involved no discrimination."

Lord Millett N.P.J. fully agreed with Ribeiro P.J., but added a few words of his own which, while reiterating the need for a defendant to be a "public official", made clear this characterisation depends on a defendant being "invested with powers, duties, responsibilities or discretions" exercisable in the public interest, and not merely on status (at [44]-[45]):

"The offence can be committed only by a public official. It cannot be committed by an ordinary member of the general public. But it does not discriminate against government employees. The reason it does not do so is that the core concept is abuse of official power. It can therefore be committed only by persons who are invested with powers,

duties, responsibilities or discretions which they are obliged to exercise or discharge for the benefit of the general public. Such persons may or may not be employed by the government; they may or may not be paid. They may be high officers of state or lowly employees; the offence may be committed as well by a police or customs officer as by a government minister. The common element is that the accused must have abused some power, duty or responsibility entrusted to or invested in him or her and exercisable in the public interest.

Every such power, duty, discretion or responsibility is granted for the benefit of the public and for a public purpose. For the person having such a power, duty or responsibility to exercise it or refrain from exercising it for his or her own private purposes, whether out of malice, revenge, friendship or hostility, or for pecuniary advantage is an abuse of power and amounts to the offence of misconduct in public office."

Two further points of significance emerge from Lord Millett N.P.J.'s judgment. The first concerns how to approach the offence of misconduct. Counsel for the appellant submitted that McMahon J. had wrongly conflated the issue of whether someone is a public officer with the question of what conduct amounts to relevant misconduct. Not so, observed Lord Millett N.P.J. (at [46]):

"The expression 'misconduct in public office' is a compound It is a mistake to treat it as involving two distinct questions: (i) was the accused the holder of a public office and (ii) did the conduct of which he or she stands accused consist of misconduct in the performance of that office? There is in reality only one question: did the conduct with which the accused is charged consist of an abuse of a power, duty or responsibility entrusted to him or her and exercisable for the public good? Splitting the question into two gives rise to two dangers: (i) that the question whether the accused was the holder of a public office may be directed to the status of the accused when it should be directed to his or her functions; and (ii) that it may overlook the fact that the misconduct with which the accused is charged must consist of an abuse of the powers, duties and responsibilities involved in the performance of those functions."

This emphasises not only the adoption of a functional test, but also the connection that must exist between the functions performed by a public official and the alleged misconduct.

This connection is reflected in the second point, which is that not all "misconduct" by a person invested with powers, duties and responsibilities entrusted to him or her, and exercisable for the public good, will amount to the offence of misconduct. Wong, observed

Lord Millett N.P.J. (at [47]), by continuing to drive, and concealing his disqualification, was guilty of "serious and deliberate misconduct in the course of his employment by the government", something of which, he supposed, many employees, in both the private and public sectors, might be guilty. But such misconduct, were it committed "by a public official who is entrusted with powers and duties exercisable in the public interest" would not constitute the offence of misconduct "because it does not amount to an abuse of those powers and duties."

Applied to Wong, this functional test made all the difference. Although Wong was undoubtedly a government employee, and arguably held "public office" if this were a matter of status or title, the only duties he was subject to were the duties owed by him as employee to his employer. Beyond that, Wong was not entrusted with any relevant powers, discretions or duties exercisable for the public benefit. Accordingly, he was not, applying this functional test, a "public official", and was not, therefore, liable to prosecution for the offence of misconduct; his conviction was correctly quashed.

D. Implications for "public office"

In Hong Kong, it is now clear that the determination of whether a person is a "public official", and amenable to prosecution for the offence of misconduct, depends on the application of a "functional" What matters is whether the alleged public official was entrusted with powers, discretions or duties to be exercised for the public benefit, being powers which are potentially open to abuse in a manner which may amount to misconduct. It is this that determines the potential application of the offence of misconduct, not the fact a person has the status or title of being a "public official" or "public office holder" "in the abstract or in isolation" (ibid., at [22]). course, those holding "public office" in a traditional sense will generally remain liable for the offence of misconduct, because appointment to a "public office" of any gravity will generally bring with it powers, discretions or duties to be exercised for the public benefit and which are open to abuse. But it is the existence of the latter, not the position itself, that exposes the public office holder to liability for misconduct.

This view of "public office" and "public official", with the emphasis on function and not status or title, has been relied on in practice elsewhere, particularly in extending the scope of the offence of misconduct to persons holding positions falling outside traditional categories of public office. It was, for example, referred to nearly a century ago in R. v. Boston [1923] HCA 59, (1923) 33 C.L.R. 386, where the High Court of Australia held that parliamentarians are

amenable to prosecution for the offence of misconduct. But rarely have courts been so explicit in adopting a functional test of "public office" and "public official". Often the fact that a person is entrusted with powers, discretions or duties has appeared in the guise of the underlying reason for the offence of misconduct, justifying its application to persons not holding traditional "public office" positions, rather than as the test itself of "public office". And inevitably, given that the offence of misconduct was formulated at common law as "misconduct in public office", the necessity of proving that a defendant held "public office", or was a "public official", has expressly remained part of the law. As a result, despite its appearance and use, the correctness of a "functional" test or approach to "public office" has remained somewhat moot. As the authors of Corruption and Misuse of Public Office, ante, put it (at p.158):

"[S]hould the test of 'public office' be a purely functional one? ... [S]hould public policy confine the criminal offence to individuals holding high offices of public trust who owe a duty to the Crown? Alternatively, is a 'third way' to be preferred: with a functional test being applied, but accompanied by a public policy limitation that the criminal offence will extend only to those whose roles are such that a breach of trust will significantly damage or disadvantage the wider public?"

In *Wong*, the Court of Final Appeal clearly rejected the second, status-based or "titular" approach in favour of a functional approach under the law of Hong Kong. In doing so, it has laid down a clear marker for the future: no longer will government employees be liable to prosecution for the offence of misconduct merely because they may have breached the duties owed by them as an employee. This is a welcome development, and one which places a necessary constraint on the over-zealous use of the offence of misconduct to pursue those civil servants who, like Wong, are "just an employee."

A second, potentially significant implication concerns the application of the offence of misconduct to non-civil servants invested with powers, duties and responsibilities of a public nature. Such persons, assessed by status, are not obviously "public officials", and yet, as McWalters in *Bribery and Corruption Law in Hong Kong, ante*, observes (at p. 691), we live "in an age where many public functions are carried out by independent statutory bodies, some of which may operate in the guise of corporations intended to be run as profit-making enterprises." Are such persons amenable to prosecution for the offence of misconduct? A functional test, such as that adopted in *Wong* may offer at least a partial solution to this question. But, as observed by McWalters (*ibid.*), a functional test, while welcome and to be preferred over a status-based test, is usually "generic" in nature,

with the possible consequence that "its very generality limits its usefulness outside of those situations where there can be no dispute that a person is a public officer." McWalters had in mind in particular the development of a "principled approach by which to determine the issue of whether a non-civil servant discharging public duties is a common law public officer." He went on to suggest (at pp.699-702) that such a principled approach might take account of a range of matters including, in particular, the nature of the duty and the nature of the body discharging the duty (or the body employing the person discharging the duty). With a functional test for "public office" now in place in Hong Kong, it is almost certainly only a matter of time before the prosecuting authorities attempt to expand the operation of the offence of misconduct to cover cases of noncivil servants discharging public duties, enabling the courts of Hong Kong to begin developing McWalters' "principled approach" (perhaps facilitated by the fact McWalters is now a judge of the Court of First Instance of the High Court of Hong Kong).

A third, more speculative implication concerns the possibility that Wong may provide a basis for the development of the "third way" identified above, which proposes the adoption of a "public policy" limitation on a functional test, resulting in a more limited scope for the offence of misconduct. How might this evolve? Perhaps as follows: (i) as stated by Lord Millett N.P.I. in Wong, determining whether there is a basis for charging a person with misconduct in public office involves one question, not two: whether the accused has abused powers, duties or responsibilities entrusted to him and exercisable for the public benefit; but (ii) it is also now clear, at least in Hong Kong, applying *Sin Kam Wah*, that the misconduct (or abuse) alleged must be "serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities"; (iii) accordingly, if the nature of the powers, duties and responsibilities entrusted to a person are such that their abuse could not be characterised as "serious", then such person should not (even could not) be charged. If accepted, this argument would seemingly have the effect of removing from the pool of possible defendants those with only "trivial" powers, duties or responsibilities, on the basis that abuse of those powers, duties or responsibilities does not involve a loss of confidence in public administration or in the integrity of the government. objections readily come to mind: first, it is illusory to speak of "trivial powers", and there is always the potential for serious abuse, even of low level powers, duties and responsibilities; secondly, that this might operate to exclude some of the persons currently successfully prosecuted for the offence of misconduct (for examples, see the

recent spate of English prosecutions for misconduct in public office which include: R. v. Stubbs and Arnold [2011] EWCA Crim. 926, [2011] 2 Cr.App.R.(S.) 648(113) (civilian employee of a police force working as a control room operator passed on information gleaned from a police computer to persons outside the police service), R. v. Ratcliffe [2009] EWCA Crim. 1468, [2010] 1 Cr.App.R.(S.) 326(51) (prison officer became involved in a relationship with a serving prisoner, with whom she communicated by mobile telephone), and R. v. Wilkie [2012] EWCA Crim. 247, [2012] 2 Cr.App.R.(S.) 393(68) (police constable searched local internal computer systems and contacted at least 20 women, using the information he found, with phone calls (some silent) and sexually explicit text messages); and thirdly, that this confuses, or conflates, the discrete elements of the offence of misconduct, as formulated in Hong Kong by the Court of Final Appeal in Shum Kwok Sher, Sin Kam Wah, and of course, Wong itself. On the other hand, Wong provides an example of overreaching by the prosecution, so perhaps the courts will be willing to countenance a further restriction on the scope of the offence of misconduct.

For the time being, Wong is a welcome confirmation that a functional approach is now to be adopted in Hong Kong to the characterisation of a person as a "public official" for the purposes of the offence of misconduct in public office. Only time will tell what further implications the adoption of this functional approach may have.

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THE SUPPLY OF DRUGS WHICH CAUSE DEATH – CAN A DEALER BE GUILTY OF MANSLAUGHTER?

Burns v. The Queen [2012] HCA 35, (2012) 290 A.L.R. 713 High Court of Australia

manslaughter – unlawful and dangerous act manslaughter – gross negligence

A. Background

The appellant, Natalie Burns, and her husband, Brian Burns, were drug addicts on a methadone treatment programme who each received methadone prescriptions. They would pool their drugs and sell them to other drug addicts from their flat in a suburb of Sydney, the purchasers either taking the methadone away or administering it whilst in the flat. On February 9, 2007, an inexperienced methadone user, David Hay, bought methadone from the appellant and her husband and took it (probably by injection) in their flat. The appellant and her husband may have assisted him in doing so, or one of them may have injected it for him. Although Mr Hay appeared to have been badly affected by the drug, he refused the offer of an ambulance being called, and the appellant insisted that he leave the flat. He did so, and was found dead in a public lavatory at the rear of the block of flats the next day.

The appellant was charged with four counts of supplying methadone and one count of manslaughter. She pleaded guilty to three of the supply counts, but stood trial on the remaining counts at the District Court of New South Wales (H.H. Judge Woods Q.C. and a jury) and was convicted of both. She was sentenced to five years and eight months' imprisonment (her husband was convicted of the same offences, but died in prison shortly after sentence was passed). The appellant appealed against her manslaughter conviction to the Court of Criminal Appeal of New South Wales (McClellan C.J. at C.L., Howie A.J., Schmidt J.), but her appeal was dismissed and her conviction upheld ((2011) 205 A.Crim.R. 240). She was, however, granted leave to appeal to the High Court of Australia (French C.J., Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.).

B. Law

The manslaughter charge was put, and left to the jury, on two distinct bases: (i) that the appellant had carried out an unlawful and dangerous act which had caused the death of Mr Hay; and (ii) that she had been grossly negligent in failing to seek medical attention for him after he had ingested the methadone.

As to (i), the Australian common law defines unlawful and dangerous act manslaughter as the carrying out of an unlawful (i.e. criminal) act which has an objectively appreciable risk of exposing another to serious injury (as distinct from the law in, e.g., England and Wales, where only a risk of "injury", rather than "serious injury", is required), death being caused thereby.

As to (ii), gross negligence manslaughter requires a defendant to have breached, through gross (or "criminal") negligence, a duty of care which he owes to another, that breach causing death; there can be no liability without such a duty, which can arise through statute, certain status relationships, contract, the voluntary assumption of the care of another and so secluding that person as to prevent others from rendering aid, or where the defendant has played a causative role in the sequence of events which have given rise to a risk of injury such that he acquires a duty to take reasonable steps to avert or lessen that risk.

C. Discussion

The case against the appellant on unlawful and dangerous act manslaughter had initially been put on the basis that the supply by her of methadone to Mr Hay was an unlawful and dangerous act which had caused his death. However, by the end of the trial, the prosecution had altered their case such that the act relied on was not the supply of the methadone but the appellant's role (whether solely or together with her husband) in administering it to Mr Hay or in assisting him in administering it to himself. In spite of this, the trial judge directed the jury that they could convict the appellant on the basis of her supply being an unlawful and dangerous act.

Contrary to their position at trial and on appeal to the state appellate court, the prosecution conceded before the High Court, and that court unanimously held, that the simple supply of an unlawful drug to an informed adult of sound mind who subsequently takes that drug is not a dangerous act: it is the taking of the drug, rather than its supply, that is dangerous, and the voluntary and informed choice of the adult negates causal connection. Since, given the trial judge's directions, the possibility that the jury had convicted on this unsound basis could not be ruled out, the court held that the appellant's manslaughter conviction could not stand.

The issue then arose of the appropriate order on quashing that conviction. The prosecution submitted that the court should order a retrial. First, they argued that there was sufficient evidence to put the manslaughter charge before a new jury on the alternative higher basis, which had developed during the trial, that the appellant had carried out an unlawful and dangerous act by administering the

methadone or assisting Mr Hay in administering it. However, the court held (by a majority of six to one, Heydon J. dissenting) that the evidence could not sustain such a course, as the possibility could not be discounted beyond reasonable doubt that Mr Hay had administered the methadone to himself without the assistance of the appellant.

Secondly, they argued that the case against the appellant on gross negligence manslaughter could still be maintained. The court, though, rejected the trial judge's approach of a voluntary assumption of care, holding that it could not be said that the appellant had voluntarily assumed the care of Mr Hay and so secluded him as to prevent others rendering aid. It also rejected the approach of the state appellate court, holding that the suppliers of drugs owed no existing duty of care towards those to whom they have supplied, even if they take the drugs whilst still in their presence, and that if such a duty were to be introduced that was a matter for the relevant legislature and not for the courts. As the joint judgment put it (at [106])-

"The supply of prohibited drugs is visited by severe criminal punishment in recognition of the harm associated with their use. The notion that at the same time the law might seek to regulate the relationship between supplier and user, by imposing a duty on the former to take reasonable care for the latter, is incongruous. What measures would reasonable care require? Should suppliers of prohibited drugs be required to supply clean needles and accurate information about safe levels of use?"

The High Court was accordingly unanimous that the appellant had owed no duty of care towards Mr Hay that she could have breached.

D. Outcome

The appellant's appeal was allowed, and her conviction for manslaughter was quashed. The court declining to order a retrial (by a majority of six to one), a verdict of acquittal was entered.

E. Comment

In deciding the question on which the appeal in fact turned, the court followed the approach of the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Mance) in the English case of R. v. Kennedy (No. 2) [2008] 1 A.C. 269 ([2007] UKHL 38), in which their Lordships reached the same conclusion by similarly reasoning that (i) the act of supplying a drug is not in itself harmful, (ii) in any event, the informed voluntary choice of the person to whom the drug has

been supplied to administer it to himself breaks the chain of causation, (iii) the only unlawful act on which a charge might be founded in such circumstances (viz. an offence contrary to section 23 of the Offences against the Person Act 1861 (unlawfully and maliciously administering, etc., a poison, etc., so as to endanger life or inflict grievous bodily harm)) could not meaningfully be applied to a case of self-administration, and (iv) the self-administration of a drug by the person to whom it has been supplied can only properly be regarded as such, and not as joint administration by the supplier and the person supplied acting together.

The High Court rejected the contrary approach of the Scottish High Court of Justiciary (Lord Hamilton (Lord Justice General), Lord Osborne, Lord Nimmo Smith, Lord Kingarth and Lord Mackay of Drumadoon) in *Kane v. H.M. Advocate*; *MacAngus v. H.M. Advocate*, *The Times*, February 6, 2009, in which their Lordships held it was necessary for the law to adopt a compromise with the doctrine of causation, and that although the adult status and deliberate conduct of a person to whom a drug was recklessly supplied by another would be important and, in some cases, crucial factors in determining whether the other's act was or was not a cause of death following upon ingestion of the drug, there might be cases short of duress, deception or mistake, where the vulnerability of the drug user to the actions of the supplier would be relevant to whether a direct causal link was made out. It is submitted that the approach of the House of Lords and the High Court of Australia is to be preferred.

One notable aspect of the majority's reasoning, in particular as to the break in causation occasioned by the informed voluntary choice of a drug user, is the distinction it maintains between legal and moral duty. As the New Zealand criminal lawyer Don Mathias notes in his blog http://www.nzcriminallaw.blogspot.co.uk/, there can be difficulties in establishing a legal duty of care in circumstances where most people would think that a person owes a moral duty towards the safety of another. This difficulty was evident here, and exemplified by the practical difficulties the court identified in discussing how such a duty owed by a drug dealer to his customers would be discharged. (The interaction between morality and the law has of course long been a crucial factor in the general consideration of criminal liability for omissions, as discussed in Andrew Ashworth Q.C.'s article in the inaugural issue of this publication ("Public Duties and Criminal Omissions: Some Unresolved Questions" [2011] J.C.C.L. 1)).

The one issue conclusively addressed neither by the British cases nor by the judgments of the majority in this case (viz. the joint judgment of Gummow, Hayne, Crennan, Kiefel and Bell JJ. (at [49]-[109]) and the concurring judgment of French C.J. (at [1]-[48])) is whether a defendant could ever be guilty of unlawful and dangerous

act manslaughter by virtue of administering a drug to another or assisting another in administering it; in this case the question was avoided simply by holding that the evidence could not make out such circumstances to the criminal standard in any event. However, in the lone dissenting judgment (at [110]-[134]), Heydon J. answered that question in the affirmative (although agreeing with the majority on the other issues): he held that the evidence was sufficient for the appellant to be properly convicted of manslaughter on that basis at a retrial.

Yet the principal difficulty with such an approach is one that his Honour himself raised: is the distinction between the supplier who lets his customer inject himself and the supplier who helps his customer to do so a sound one? Indeed, would it be just for the supplier who assists his customer (who may be an inexperienced and unskilful drug user who would be at greater risk if left to his own devices) to be liable for his death but for the supplier who simply says "you're on your own" to escape liability? That is doubtless an issue that courts in many jurisdictions will at some point be compelled to address.

PETER FITZGERALD.*

ATTEMPTS LIABILITY IN NEW ZEALAND

R. v. Harpur [2010] NZCA 319 (July 23, 2010) Court of Appeal of New Zealand

attempted sexual violation — impossibility — proximate acts

A. The threshold for attempts

The question of how to determine the threshold between acts of mere preparation and a consummated criminal attempt has bedevilled the courts in common law jurisdictions for many generations. The use of nouns like "proximity", "remoteness", "immediacy", "preparation", "unequivocality" have come to define the boundaries of the discourse constituting attempts theory, yet none has been able to provide a clear conceptual means of determining when an attempt has occurred, as a matter of law. The problem with attempts liability,

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as it seems, has been in calculating the point at which merely preparatory conduct acquires the gravitas of acts sufficiently proximate to the intended offence to be deemed an attempt to achieve it.

The issue was reconsidered by the New Zealand Court of Appeal in R. v. Harpur. The case is important because, first, it overturns previous case law which guided New Zealand courts in this area for over 30 years and, secondly, it is a case of factual impossibility. In Harpur, the Court of Appeal declined to endorse any particular test of proximity, preferring to focus on the efficacy of preparatory acts accompanied by a clear intention to commit the offence aimed at as being evidence of a criminal attempt.

B. The facts of Harpur

H, using the name "Adam" had begun texting a young woman (B) making sexually explicit suggestions. He sent her a video depicting a man raping a young girl. He bragged about his sexual exploits with children. In disgust, B went to the police and, under their guidance, made arrangements to meet H the next day. She said she would bring her 10-year-old sister and four-year-old niece. Neither child existed in fact. They were invented for the purposes of the police operation. H then described graphically his intentions with respect to the four-year-old and asked if the 10-year-old "would fuck". B's intention with the four-year-old was to lick and touch her genitalia and then masturbate himself over her. His intention with the 10-year-old had been to have intercourse with her, but only if she wanted it. B described the girls as "keen" and arranged a place to In due course, a car fitting the description of B's car meet with H. pulled up to H, with a female police officer inside. H was arrested. He ultimately faced 19 charges, as a result of boasts made in text messages and material on his computer. These included raping, sexually violating, indecently assaulting and intimately photographing He eventually pleaded guilty to all but two a five-year-old girl. charges. He pleaded not guilty to attempting to violate sexually a 10-year-old girl by raping her and attempting to violate sexually a four-year-old girl by unlawful sexual connection.

The district court judge discharged H on those counts and the Crown appealed on a question of law which asked whether the district court judge was correct in finding, as a matter of law, that the acts done with intent to commit offences of sexual violation were only preparation for the commission of those offences and too remote to constitute attempts to commit them under section 72(2) of the *Crimes Act* 1961. The Crown applied for a full court on the basis that they wished to challenge the correctness of *R. v. Wilcox* [1982] 1 N.Z.L.R. 191 (Court of Appeal), which had been the

principal authority on criminal attempts and which had been relied on by the district court judge in determining that H's acts had not gone beyond mere preparation.

In considering whether the judge was correct in finding that H's acts were mere preparation the court in *Harpur* re-examined the statutory language in section 72, which sets out the law of criminal attempts in New Zealand. It states:

"Attempts

- **72.-**(1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.
- (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.
- (3) An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence."

In considering section 72, the Court of Appeal made a number of general observations about the provision. First, it pointed out that subsection (1), the key subsection, is in very broad terms. While at first blush it does suggest, as noted above, that *any* act done for the purpose of accomplishing the intended offence will suffice, the court considered that Parliament cannot have meant that. This is made clear by subsection (2). The law since the middle of the nineteenth century has been clear that "acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are" (R. v. Eagleton (1855) Dears C.C. 515, 538; 169 E.R. 826, 835). The court considered that the breadth of section 72(1) and the looseness of the language employed suggest that it was the intention of Parliament that the courts apply the provision flexibly and in accordance with the justice of the case, without undue constraint from the legislature (at [13]).

Secondly, as regards subsection (2), the court held that its purpose was to clarify, in jury trials, the separate functions of judge and jury. It found that the subsection does not of itself determine that mere preparation for the commission of an offence does not constitute an attempt. Nor does it, of itself, prescribe that "too remote" acts cannot constitute attempts. The purpose of subsection (2), the court found, was to define roles and make it clear that a judge should withdraw an attempt charge from the jury if the judge considers, on

the basis of the Crown evidence, even if accepted, that the offender never got beyond merely preparing to commit an offence, or that his acts were otherwise too remote (at [14]).

The third point made by way of an overview of the section was that subsection (3) was first introduced in 1961, when the *Crimes Act* was reenacted. It was intended to reverse the "equivocality test" formulated and applied in *R. v. Barker* [1924] N.Z.L.R. 865 (Court of Appeal). This means that, under New Zealand law, an act may amount to an attempt even if there is no act unequivocally showing intent. However, as this note will demonstrate, the strength of the evidence of an intent to commit the substantive offence will go a long way towards establishing an attempt where sufficiently proximate acts are present.

The court held that Parliament has painted "on a very broad canvas", leaving the courts to apply underlying concepts on a case-by-case basis, as justice demands. Because Parliament has chosen not to lay down detailed criteria for determining whether conduct amounts to an attempt, neither should the court be prescriptive. In the court's view, the law was not working badly, despite the continuing judicial debate about where the line between preparation and attempt is to be drawn. This was well-illustrated, the court found, in recent attempts by the Law Commission for England and Wales (see *Conspiracy and Attempts* (Law Com. no. 318, TSO, 2009)) to reconcile the widely divergent views adopted by English courts, so as to achieve law that was "neither under- nor over-inclusive" (at [17]).

The court found that whereas the English search "for the Holy Grail" had been prompted by the decision in R. v. Geddes, 160 J.P. 697 (Court of Appeal), in New Zealand that quest was prompted by R. v. Wilcox, which was the most frequently cited case on attempts, despite being only one of a number of appellate authorities. It was also a decision that had been the subject of both academic and judicial criticism.

C. The facts of Wilcox

In order to better understand the way in which the law has evolved, it is necessary to outline briefly the facts of *Wilcox*. The accused had admitted that he had purchased air rifles and balaclavas for the purpose of robbing a suburban post office, that he had arranged with an associate for transportation and that he had commenced the journey towards the post office. But he claimed that in the course of the journey he had changed his mind and decided not to go through with the robbery. In the event, the police had received a warning and apprehended the car carrying the defendant and his associates as it was due to arrive in the suburb, albeit about one kilometre from the post office. On appeal against a conviction for attempted robbery, it

was held the defendant could not be guilty of attempted robbery, because no part of his activity had gone beyond mere preparation. At the time the car was stopped by the police, the defendant and his associates were, it was held, doing no more than "getting themselves into a physical position" close to the post office from which an attempt at robbery could be launched. As a matter of law it was held that the defendant's conduct did not amount to an attempt. The broad defence was that at no stage had anything been done that had got beyond mere preparation for a robbery yet to be attempted. Importantly, the defence depended simply upon an assessment of conduct. The Court of Appeal held that whatever his state of mind at the time, the defendant could not be found guilty if his activity had in fact gone no further than preparation.

While this approach has served the interests of law and policy in this area, it has not been without its difficulties. These have centred, in particular, around the fact that *Wileox* requires the court to identify a discrete act, or acts, sufficiently proximate to the intended offence while prohibiting consideration of the character of conduct *as a whole*, and in particular, the defendant's state of mind.

D. Reassessing R. v. Wilcox

In R. v. Harpur the Court of Appeal reconsidered its decision in Wilcox, and concluded that in some significant respects the decision was wrong. In particular, the court responded to four specific criticisms of the decision advanced by counsel for the Crown. They usefully identify what are now considered to be the principal weaknesses in the court's reasoning in Wilcox, warranting a reassessment of the Court of Appeal's evaluation of the conduct displayed in that case.

1. Considering acts in context of evidence of intention

Criticism was made of a passage in *Wilcox* where the court suggested that there was a need for "independent and careful attention" to be given to the *mens rea* and *actus reus* ingredients deriving from section 72(1) to (3). In particular, it was argued that the suggestion that the acts should not be considered in the context of evidence as to intention was artificial and wrong (at [24]). Rather, the court, in determining whether acts are proximate, should be able to take into account *all* the circumstances in which the acts occurred, including evidence as to intent, since evidence as to intent "gives the acts meaning" (at [24]). The Court of Appeal, while not fully satisfied that the *Wilcox* court had intended to imply that each element of *actus reus* and *mens rea* had to be considered completely separately, nevertheless held that if that had been the court's suggestion, then

it was wrong. The court agreed with the opinion of the Nova Scotia Court of Appeal in R. v. Boudreau (2005) 193 C.C.C. (3d) 449 (at [32]) that any analysis of the actus reus must be viewed in conjunction with the mens rea. In particular, the Court of Appeal agreed with the analysis of Canadian law professor, Kent Roach, that "in practice, a more remote actus reus will be accepted if the intent is clear" (see Kent Roach, Criminal Law (Irwin Law, Toronto, 2000), 102, cited in R. v. Harpur (at [25])).

2. Focus on what the actor had still to do

It was also submitted by Crown counsel that the court in Wilcox had wrongly focussed on what the actor still had to do rather than on what was already done and whether that was immediately or proximately connected with the intended offence. It was submitted that this approach was contrary to what the Court of Appeal had held in Police v. Wylie [1976] 2 N.Z.L.R. 167, where the court found that there was ample evidence that the "declared desire of the respondents to purchase cocaine was being translated into action". The court found that the respondents' attendance at the house where they had gone to purchase the drugs in the circumstances disclosed by the evidence "amply justified their conviction for attempting to procure the drug" (at p.170). In R. v. Harpur, the decision in Wilcox was criticised on the basis of the court's conclusion that it was not possible to hold that any of the passengers in the car, by the time it was stopped by the police, were doing more than getting themselves into a physical location close to the post office from which an attempt at robbery could be directly launched. However, the court in Harpur was unwilling to criticise its earlier decision as erring in legal principle in considering how much remained to be done: "That is always relevant, though not determinative" (at [28]) (and see also Henderson v. The King (1948) 91 C.C.C. 97 (Supreme Court of Canada), which the court approved). Its criticism was rather on the court's evaluation of the facts, determining that there must be a factual evaluation in terms of "time, place, and circumstance." As to the first two, the court noted that in Wilcox the car was stopped just short of its intended destination. As regards the last, when the car was stopped, the occupants were found in a state "wholly ready to commit the robbery, with their weapons loaded." In the court's view they had done more than "merely getting themselves into a physical location ... from which an attempt at robbery could be directly launched" (ibid.).

3. Conflict with earlier authority

A third criticism of Wilcox was that the decision conflicted with earlier Court of Appeal authority, in particular R. v. Bateman [1959] N.Z.L.R. 487. Bateman was a prosecution for attempted indecent assault on a male, where the appellant had made various indecent suggestions to a 17-year-old youth, A, that he should accompany him to his bach (cottage) for indecent purposes. The same suggestion was made to a friend of A, suggesting that he should go to the bach on the following evening. Both young men then arranged a meeting with B at another location. They duly met him and informed him that they were going to get a policeman, which they did. B was duly arrested and convicted of attempted indecent assault on a male. was held on the appeal that the series of acts were "sufficiently proximate and were more than mere preparation." The court upheld the trial judge's ruling that the Crown evidence could constitute an attempt to commit the offence. It held that it did not matter that B had not even commenced the "journey to the site of the proposed crime", since in the circumstances he had done "all he could to persuade the lad to accompany him there and then to the place where the offence could be committed" (at p.491). Acknowledging that the two decisions are difficult to reconcile, the Court of Appeal expressed its preference for Bateman.

4. Viewing conduct cumulatively

The final criticism of *Wilcox* was of the view expressed there that the conduct of the actor could not be viewed cumulatively as constituting the *actus reus*. As noted earlier, in *Wilcox* the court had held that the purchase of the weapons or balaclavas "could not give increased significance as a matter of law to the car journey or any part of it" and that "independent acts of mere preparation cannot take on a different quality simply by adding them together" (at p.194). In *Harpur*, the court accepted the view that the reference in section 72(1) to the doing or omission of an "act" did not mean that the act had to be considered in isolation. Their Honours noted that under section 33 of the *Interpretation Act* 1999, the singular includes the plural, so that section 72(1) could be read as:

"(1) Everyone who, having an intent to commit an offence, does or omits *acts* for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended..." (at [34], emphasis added).

The court agreed that it was natural and inevitable to have regard to the conduct viewed cumulatively up to the point when the conduct in question stops. This approach, the court found, was consistent with what was said in *Police v. Wylie* and in R. v. Mullaney, unreported, May 3, 2000, H.C. (at [38] (Penlington J.))¹.

E. The outcome

The court concluded that the appellant's intent, as expressed in his text messages, could not have been clearer. The court found that strong evidence of intent, as here, can assist in assessing the significance of acts done towards the commission of the intended offence. H told B where to meet him. He was at the designated spot. The meeting was close to a motel he had stayed in the previous night and where, presumably, the "children" would have been taken. While H was, no doubt, disappointed to find the driver of B's car was a police officer, he had nevertheless intended to take the four-year-old to a place nearby where the offending could take place. The fact that the intended offence was impossible because the girls did not exist was no bar to the prosecution because of the operation of section 72(1). Nor, the court held, did it matter that the completion of the crime was dependent on the co-operation of B and the child.

The court accepted counsel's argument that the district court judge's decision raised real practical problems for the police. It posed a range of questions around when the police could have intervened if there had been a child, whether H needed to have personally met the child and taken her to the motel room, and when the police would have been able to intervene before the offence occurred. The court concluded that the Crown evidence, if accepted, showed a clear intent to commit a sexual violation of the four-year-old girl H believed B could provide. He performed a number of acts which, taken together, amounted to an attempt to commit sexual violation:

"He had moved beyond mere preparation and, at the time of his arrest, was lying in wait for his victim. His conduct was not too remote to constitute an attempt; it was proximately connected with the intended offence" (at [44]).

The court held that the district court judge had been wrong to discharge H on the charge of attempting to violate sexually the four-year-old. His acquittal on that count was quashed and he was directed to stand trial on that count alone. The trial judge's decision to discharge the defendant on the charge of attempting to sexually violate the 10-year-old girl was not challenged on the appeal.

The Court of Appeal concluded that section 72 does permit the defendant's conduct to be considered in its entirety. It held that if the court in *Wilcox* was implying that a defendant's acts must be looked at discretely when determining whether an attempt had been

¹ Hamilton T000172.

made, then the decision was wrong. The court considered that while the alleged errors of approach in *Wilcox* were "somewhat overstated", the outcome in *Wilcox* was wrong. It would have found the acts of the defendant in *Wilcox* to be sufficient to constitute attempted robbery. Accordingly, the court found the decision to be inconsistent with the decisions in *Henderson*, *Wylie*, *Bateman* and *Boudreau*, with which it agreed.

F. Comment

Debate around the appropriate threshold for a criminal attempt is probably interminable. This is because the law in this area is not dealing in certainties but in degrees of propinquity which are necessarily vague and indeterminate. It is little wonder that courts have struggled to agree on the formulation of a generally acceptable threshold test. In Harpur, the court refrained from any attempt to do so, recognising that in the circumstances of the case a "wholesale reevaluation" of the law of attempts was unnecessary. concern the court, however, was the problem that police may have to wait longer before acting in order to reach the threshold of sufficient proximity to the intended crime. In those circumstances, the court is then required to manage the risk to the safety of the public at large. However, this did not persuade the court that a "real and substantial step" test, favoured in Canada and the United States, would have taken analysis of the proximity issue significantly further, and may have amounted to "substituting somewhat fuzzy words for equally fuzzy words in the statutory provision. There is no magic formula which avoids the need for judicial evaluation" (at [48]).

While the English Law Commission's idea of providing a list of "guiding examples" had produced a diversity of conflicting views, the court in *Harpur* was drawn to the examples provided in article 5.01 of the American Model Penal Code. These supplement the definition of attempt by listing discrete forms of conduct that may constitute a "substantial step" under the American definition. They include, as relevant to the present appeal:

- (a) lying in wait, searching for or following the contemplated victim of crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitring the place contemplated for the commission of the crime.

Without formally endorsing the American model, the court concluded that trial judges might find article 5.01 of assistance in determining whether the actor's conduct amounts to an attempt.

But, by choosing not to endorse any particular test of proximity, the *Harpur* court took a bold step. The court rejected tests framed in terms of "real and substantial step" or "last available act". It also rejected the idea that "getting themselves into a physical location ... from which an attempt ... could be ... launched" was merely evidence of preparation not amounting to an attempt. In taking this approach the court left the field wide open for determining when an attempt has occurred. At least for the foreseeable future, the focus in New Zealand law is likely to be on what the offender clearly intended. If his or her intention was clear, whether or not unequivocal, lesser acts of preparation, when considered cumulatively, may be sufficient to find an attempt which might previously have been too remote.

WARREN BROOKBANKS.*

WHEN FAILURE TO DISCLOSE HIV-POSITIVE STATUS VITIATES CONSENT TO SEX IN CANADA

R. v. Mabior, 2012 SCC 47 R. v. D.C., 2012 SCC 48 (October 5, 2012) Supreme Court of Canada

HIV – consent – sexual offences

A. The issue

A number of jurisdictions have grappled with a particularly difficult question in respect of the Human Immunodeficiency Virus (HIV): when does failure to disclose that one is HIV-positive, combined with engaging in otherwise consensual sexual relations, make that act of engagement in sex a criminal offence?

In two recent cases, the Supreme Court of Canada examined this question. The cases ultimately turned on rather different matters, but were heard *in tandem*. This case note focuses first on *Mabior*,¹ then outlines its "sister case" of *D.C.*² Together, they provide a good understanding of the current Canadian approach to the criminali-

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¹ R. v. Mabior, 2012 SCC 47 (hereafter "Mabior (SCC)").

² R. v. D.C., 2012 SCC 48.

sation of exposure to HIV without disclosure – treating it as a sexual offence, rather than an offence against the person.

B. Mabior: the facts

Mahior was heard on appeal from the Court of Appeal for Manitoba.³ Clauto Lual Mahior's house was known as a "party place".⁴ He regularly provided his guests with strong "Black Ice" beer and drugs.⁵

Mabior was diagnosed as HIV-positive on January 14, 2004,6 of which he was informed no later than January 27, 2004.7 He underwent regular anti-retroviral therapy. The effect of such treatment was helpfully outlined by the Supreme Court:

"the transmissibility of HIV is proportional to the viral load, *i.e.* the quantity of HIV copies in the blood. The viral load of an untreated HIV patient ranges from 10,000 copies to a few million copies per millilitre. When a patient undergoes anti-retroviral treatment, the viral load shrinks rapidly to less than 1,500 copies per millilitre (low viral load), and can even be brought down to less than 50 copies per millilitre (undetectable viral load) over a longer period of time."8

However, a patient undergoing anti-retroviral treatment may display "spikes" in viral load, and common infections, sexually transmitted diseases, and issues with treatment (such as delays in taking medication) can lead to fluctuations in a patient's viral load.⁹

Mabior began anti-retroviral treatment in April 2004.¹⁰ He was tested regularly for HIV loads – in May, August, October and December 2004, and in January, May, September and December 2005.¹¹ His initial load was 6,100 to 6,300 copies per millilitre – typified as "probably low but possible infectivity."¹² It then dropped to 50 copies per millilitre or less (*i.e.* an "undetectable" viral load) from August 2004 onwards.¹³

Between his diagnosis and the end of December 2005, Mabior engaged in sexual relations with a number of women, on some occasions with a condom, on others without. Of the nine

³ R. v. Mabior, 2010 MBCA 93, 258 Man.R.(2d) 166 (hereafter "Mabior (MBCA)").

⁴ *Mabior* (SCC) (n.1), [5].

⁵ R. v. Mabior, 2008 MBQB 201, 230 Man.R. (2d) 184 (hereafter "Mabior (MBQB)"), [47].

⁶ Mabior (MBCA) (n.3), [7].

⁷ Mabior (MBQB) (n.5), [95].

⁸ Mabior (SCC) (n.1), [100].

⁹ Mabior (MBCA) (n.3), [112].

¹⁰ *ibid.*, [12].

¹¹ *ibid.*, [114].

¹² ibid.

¹³ *ibid.*, [122], [127], [129], [133], [137].

complainants, one was 12 at the time of the sexual encounters;¹⁴ four others were aged 17;¹⁵ another four were adults.¹⁶ He did not inform these women of his HIV status – indeed, he replied in the negative when one of them asked if he had any "STDs" (sexually transmitted diseases) or "anything else".¹⁷ Two of the complainants were informed by others of his HIV-positive status,¹⁸ and one of them continued to have sex with him thereafter.¹⁹ Eight of the nine complainants gave evidence that they would not have consented to sex with Mabior had they known he was HIV-positive. None of the complainants contracted HIV.²⁰

C. Canadian law on exposure to a risk of contracting HIV

In Canada, non-consensual sex is a sexual assault contrary to section 265 of the *Criminal Code* 1985.²¹ Under section 265, fraud can vitiate consent to sex.²² In R. v. Cuerrier,²³ the Supreme Court of Canada held that the failure to disclose one's HIV-positive status constitutes just such a fraud. As exposure to HIV "endangers the life of the complainant",²⁴ this is an offence of aggravated sexual assault, under section 273.²⁵

D. The decisions in Mahior

1. Appellate history

Mabior was charged with twelve counts.²⁶ These included one count each of invitation to sexual touching and sexual interference in respect of the 12-year-old,²⁷ of which he was convicted,²⁸ and

¹⁴ Mabior (MBQB) (n.5), [42] ("D.C.S.").

¹⁵ *ibid.*, [30] ("D.H."), [35] ("S.H."), [39] ("C.B."), [47] ("F.L.").

¹⁶ *ibid.*, [28] ("K.G."), [33]-[34] ("M.P."), [37]-[38] ("K.R."), [53]-[56] ("J.L.L.").

¹⁷ *ibid.*, [35] ("S.H.").

¹⁸ *ibid.*, [43] ("D.C.S."), [49] ("F.L.").

¹⁹ *ibid.*, [43] – the 12-year-old ("D.C.S."). In the period at issue, Mabior was aged between 26 and 28, as is apparent from the police notice posted online: http://www.winnipeg.ca/police/press/2006/03mar/2006_03_21.stm accessed November 20, 2012.

²⁰ Mabior (SCC) (n.1), [6]. The trial judge wrongly stated, in opening, that he was charged with ten counts of aggravated sexual assault: *Mabior* (MBQB) (n.5), [1].

²¹ R.S.C. 1985, c. C-46; *Mabior* (SCC) (n.1), [2].

²² Criminal Code 1985, s.265(3)(c): "no consent is obtained where the complainant submits or does not resist by reason of ... fraud"

²³ Cuerrier, 1998 CanLII 796 (SCC), [1998] 2 S.C.R. 371.

²⁴ Criminal Code 1985, ss.268(1), 273(1).

²⁵ Cuerrier, [95]; Mabior (SCC) (n.1), [2].

²⁶ Including one count of forcible confinement, of which he was acquitted: *Mabior* (MBQB) (n.5), [1], [167].

²⁷ *ibid.*, [1].

²⁸ *ibid.*, [165].

which convictions were confirmed by the Manitoba Court of Appeal.²⁹ They also included nine counts of aggravated sexual assault based on his failure to disclose to the complainants that he was HIV-positive.³⁰ This case note turns on these nine counts.

The trial judge acquitted Mabior on three of the charges of aggravated sexual assault, on the basis that he used a condom in each case (or it could not be proved that he had not done so), *and* his viral load was undetectable at the time the sexual encounters took place.³¹ The Crown did not appeal these acquittals. Mabior was convicted of the other six of these charges.³²

The Manitoba Court of Appeal, however, overturned four of those remaining convictions, on the basis that "either low viral loads or condom use could negate significant risk".³³ It upheld two of the convictions: in one case, there had been "unprotected sex on a number of occasions";³⁴ in the other, the condom had broken on three or four occasions;³⁵ both women were exposed to a significant risk of harm.³⁶

The Crown appealed on the four convictions of aggravated sexual assault that had been overturned by the Court of Appeal, and Mabior appealed the two remaining convictions, to the Supreme Court.

2. The Supreme Court's approach

The Supreme Court judgment – given by McLachlin C.J. – examined in some detail the history of aggravated sexual assault in Canada.³⁷ This showed that fraud had been held to vitiate consent where it led to a mistake as to the sexual nature of the acts, or as to the identity of the man with whom the complainant was having sex. Although interesting, this analysis, with respect, goes nowhere in tackling the difficult questions at hand. The judgment also undertook careful analysis of a number of other jurisdictions' approaches to similar factual matrices – though it did not cover the relevant New Zealand law in full.³⁸ Having found this analysis relatively inconclusive, the

²⁹ Mabior (MBCA) (n.3), [36].

³⁰ Mabior (SCC) (n.1), [7].

³¹ Mabior (MBQB) (n.5), [166]; and [142]-[144], [149]-[151], [152]-[154]. See the Supreme Court's on the significance of an "undetectable" viral load, ante.

³² ibid., [164] (emphasis added).

³³ Mabior (SCC) (n.1), [9].

³⁴ *Mabior* (MBCA) (n.3), [119] (M.P.).

³⁵ *ibid.*, [121] (K.R.). There were other increased risk factors – Mabior "was involved with multiple partners" and "was listed as a Chlamydia contact by another woman during this period": *ibid.*, [122].

³⁶ *ibid.*, [120], [122].

³⁷ Mabior (SCC) (n.1), [21]-[43].

³⁸ *ibid.*, [53]. The court missed the *Crimes Act* 1961, s.128A(7) (see Pt F.3., *post*). Don Mathias identified this "mistake" in his "Risks, numbers and criminal

court counselled against "extending the criminal law beyond its appropriate reach in this complex and emerging area of the law".³⁹

The Chief Justice then examined the *Cuerrier* test in some detail. It typified the test as requiring both a "misrepresentation or non-disclosure of HIV", and a "significant risk of bodily harm" for the complainant.⁴⁰ Finding the *Cuerrier* test carved out "an appropriate area for the criminal law",⁴¹ the judgment attempted to give it greater certainty by establishing more clearly where "sexual relations with an HIV-positive person pose a 'significant risk of serious bodily harm"⁴² – where there is a "a realistic possibility of transmission of HIV".⁴³ More clearly, it held that:

"as a general matter, a realistic possibility of transmission of HIV is negated if (i) the accused's viral load at the time of sexual relations was low, and (ii) condom protection was used."44

In so doing, it examined the effect of condom use and anti-retroviral therapy on the risk for vaginal intercourse where the male partner is HIV-positive.⁴⁵ To avoid the difficulty of establishing, through evidence, an "undetectable" viral load – and as "detectability" related to the quality of the tests available for detecting viral loads at the moment – the court rather approached the test in terms of "low" viral loads.⁴⁶

Applying this refined *Cuerrier* test, the Supreme Court restored the convictions in respect of three of the four remaining cases,⁴⁷ and upheld one acquittal⁴⁸ on the basis that Mabior's viral load was low at the time, and he had used a condom.

E. Thorny issues

The Supreme Court's judgment in *Mabior* left a number of questions unresolved. A number of interveners – HIV and AIDS charities – argued that criminalisation discourages diagnosis and treatment, stigmatising HIV whilst damaging efforts to contain its spread.

responsibility", *Criminal Law Casebook – Developments in Leading Appellate Courts* (October 8, 2012) http://nzcriminallaw.blogspot.co.uk/2012/10/risks-numbers-and-criminal.html accessed November 20, 2012.

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    39 Mabior (SCC) (n.1), [5].
    40 ibid., [57].
    41 ibid., [58].
    42 ibid., [82].
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ibid., [91], [93].
 ibid., [94].

⁴⁵ *ibid.*, [96]-[101].

⁴⁶ *ibid.*, [102].

⁴⁷ *ibid.*, [109] (S.H., D.C.S., D.H.).

⁴⁸ ibid. (K.G.).

This is not the place to discuss these public policy issues. However, two clear issues arise from the judgment.

1. The Williams paradox

In R. v. Williams,⁴⁹ a man was charged with aggravated sexual assault. Six months into an 18-month relationship, he had been diagnosed as HIV-positive. He had not disclosed this fact to his partner, and continued to have sex with her. She was later found to have contracted HIV, and it was accepted that he had infected her. However, as it could not be proven whether the infection had taken place before or after Williams discovered he was HIV-positive, a conviction for attempted aggravated sexual assault – the lesser, inchoate form of the same offence – was substituted.

This brings to light a paradox in the reasoning of *Cuerrier*: it is easier to convict a defendant of a more serious offence where the victim did not contract HIV than where he or she did. This clearly fails to account for the harm caused. However, this paradox did not fall for consideration by the court in Mabior – though the court came tantalisingly close, recognising that "common law jurisdictions criminalize the *actual sexual transmission* of HIV",⁵⁰ but not recognising that what the *Cuerrier* test criminalises is not the actual transmission, but the exposure of others to the risk of infection.

2. "What are the chances?"

The Supreme Court's judgment in *Mabior* is fairly detailed, and the expert evidence relied on examined at some length the statistical likelihood of infection in various circumstances.⁵¹ However, this risk analysis did not explicitly form part of the decision on where a complainant is exposed to "a significant risk" of infection.

Don Mathias has done some solid number-crunching, based on the rough figures and probability ranges given in the judgment.

"Broadly, and converting the figures given in the judgment ... the evidence was that the probability of transmission of HIV infection during unprotected sexual intercourse may be as high as 0.008 or as low as 0.0005. That is, 8 in 1,000, or 5 in 10,000. If a condom is used, the risk reduction is 80 per cent, so at the highest the probability of transmission would be 0.0016. If therapy had reduced the viral load, as it had in this case, to a low level, the risk of transmission may be reduced by roughly 92 per cent, so that if a condom is used the probability of transmission would then be 0.000128.

⁴⁹ Williams, 2003 SCC 41, [2003] 2 S.C.R. 134.

⁵⁰ Mabior (SCC) (n.1), [50] (emphasis in original).

⁵¹ See, in particular, *ibid.*, [97].

If a condom is not used but the viral load is low, the probability of transmission is 0.00064."52

Mathias goes on to compare this to other risks we run on a fairly frequent basis:

"in the UK the average risk of death in any one year from injury or poisoning is 1 in 3,137, or a probability of 0.0003. The risk of dying in a road accident in the UK is 1 in 16,800, or a probability of 0.00006. And for cancer death it is 1 in 387, or probability 0.003.

"So in Mabior a risk that might have been about ten times the risk of dying in a road accident amounted to a realistic possibility of transmission of HIV. Or about one fifth the risk of dying of cancer."⁵³

This is interesting. Although this sort of relative analysis was not attempted by the Supreme Court, it underlies their analysis – and may legitimate their approach. If one considers that the consequences of contracting HIV, even with modern medicine and healthcare, can be devastating, it makes some sense to compare these statistics with those for mortality. And surely it makes sense that to expose another to a risk that is ten times that of their dying in a car accident is a significant exposure.

F. Comparisons with other jurisdictions

By contrast to Canada's approach, most other Commonwealth and common law jurisdictions will criminalise exposure to HIV as an offence against the person, akin to wounding, rather than a sexual offence. These approaches were described in *Mabior*.⁵⁴

1. England and Wales

In England and Wales, the equivalent legislation to the fraud which will vitiate consent to sex can be found in sections 74 to 76 of the *Sexual Offences Act* 2003. In particular, by section 76 (on presumptions), fraud will only be presumed to vitiate consent to sex where:

"(a) the defendant intentionally deceived the complainant as to *the nature or purpose* of the relevant act; [or]

⁵² Mathias (n.38).

⁵³ *ibid.* Mathias basis these risks on: Health and Safety Executive, "Risk education statistics" < http://www.hse.gov.uk/education/statistics.htm accessed November 20, 2012.

⁵⁴ Mabior (SCC) (n.1), [49]-[55] – though not always entirely accurately (see text at n.38, ante).

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant."55

In R. v. B., ⁵⁶ this precise point was considered. B, who was HIV-positive, but had not disclosed this to a sexual partner, was charged with rape. The Court of Appeal held that his HIV status did not go to "the nature or purpose of the relevant act":

"Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexually transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease." ⁵⁷

England and Wales criminalise the harm caused by infecting another with HIV. In R. v. Dica,⁵⁸ the Court of Appeal held that, where a person, A, knows he or she carries HIV (or any other sexually transmitted disease), and engages in consensual sexual relations with another, B, without informing B of the fact he or she is HIV-positive, and not intending to infect B, A will be liable for conviction under section 20 of the Offences against the Person Act 1861, for inflicting grievous bodily harm on B. If B did know of A's HIV-positive status, she could be taken to have consented to that harm being inflicted; but where A undertook a concerted campaign of infection, B could not consent to that infection.

2. Australia

In six of the nine Australian jurisdictions, exposure to HIV without transmission of the virus is not criminalised. In South Australia, reckless exposure is criminalised;⁵⁹ and Victoria⁶⁰ and the Northern Territory⁶¹ apply lesser offences to cases where there was exposure, but no transmission of the virus.

⁵⁵ Sexual Offences Act, s.76 (emphasis added).

⁵⁶ B. [2006] EWCA Crim 2945, [2007] 1 W.L.R. 1567.

⁵⁷ *ibid.*, [17].

⁵⁸ Dica [2004] EWCA Crim 1103, [2004] Q.B. 1257.

⁵⁹ Criminal Law Consolidation Act 1935 (S.A.), s.29 ("Acts endangering life or creating risk of serious harm").

⁶⁰ Crimes Act 1958 (Vic.), ss.22 ("Conduct endangering life") and 23 ("Conduct endangering persons").

⁶¹ Criminal Code Act 1983 (N.T.), ss.174C ("Recklessly endangering life") and 174D ("Recklessly endangering serious harm").

3. New Zealand

In New Zealand, section 128A(7)⁶² of the *Crimes Act* 1961, provides that "A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality." No cases of HIV transmission have arisen under this section to date; however, in a factual matrix like that in *Mabior*, a "mistake" might well be regarded as a failure to recognise a realistic possibility of transmission of HIV.⁶³

The leading New Zealand case on HIV transmission is R. v. Mwai.⁶⁴ There, a man was convicted of criminal nuisance⁶⁵ for recklessly exposing a number of people to HIV through unprotected sex. Upholding Mwai's conviction, the Court of Appeal typified his bodily fluid containing the HIV virus as a "dangerous substance" under his control, and for which he was liable.⁶⁶

G. D.C.

Both *D.C.* and *Mabior* related to charges of aggravated sexual assault due to non-disclosure of HIV status. This explains why the cases were treated as companion appeals. However, they ultimately turned on rather different questions of law and of fact.

1. The facts

This case is rather simpler. D.C., a woman, engaged in vaginal sexual intercourse with the complainant. At the time, she was aware that she was HIV-positive, though her viral load was undetectable. The complainant alleged that she had not told him of her HIV status before one or more initial sexual encounters; when she then told him, he broke off their relationship for a week. He then renewed it, and they started a four-year relationship. At the end of this time, D.C. was briefly hospitalised, decided to end the relationship, and asked the complainant to move out. He refused. When she then tried to take her belongings from the house, a fight ensued. The complainant was convicted of an assault on D.C.⁶⁷ She in turn was charged with aggravated sexual assault, in respect of the intercourse that allegedly took place before she had divulged that she was HIV-positive.⁶⁸

⁶² Enacted in 2005: Crimes Amendment Act 2005, s.7.

⁶³ See Mathias (n.38).

^{64 [1995] 3} N.Z.L.R. 149, [1995] 4 L.R.C. 719 (Court of Appeal, Wellington).

⁶⁵ Crimes Act 1961, s.145.

⁶⁶ Under the *Crimes Act* 1961, s.156 (duty of persons in charge of dangerous things); this was the legal duty that was allegedly breached, and founded the charge.

⁶⁷ D.C. (n.2), [4]-[6].

⁶⁸ *ibid.*, [7].

At trial, she claimed they had used a condom, whereas he claimed they had not.⁶⁹ The judge found neither witness was credible,⁷⁰ but – rather surprisingly – found that a doctor's note made seven years earlier and referring to a broken condom was "independent evidence" that D.C. had engaged in unprotected sex.⁷¹ The Supreme Court explained the judge's reasoning as follows:

"He took for granted that D.C. told Dr Klein a condom was worn but had broken. He inferred this was a lie by assuming she wanted to camouflage from her doctor the fact that she had unprotected sex. From this inference of a lie, the trial judge drew a further inference that no condom had been used, confirming the complainant's evidence on that point. On this basis, the trial judge concluded the prosecution had established beyond a reasonable doubt that D.C. was guilty of sexual assault and aggravated assault."

The judge held that D.C. had lied to her doctor, and therefore inferred that no condom had been worn then, or on the occasion the subject of the complaint. The complainant did not contract HIV.⁷³

In the Quebec Court of Appeal, the conviction was overturned, as the doctor's evidence was not "independent evidence" in support of the claimant. The Crown appealed this decision to the Supreme Court.

2. The Supreme Court's judgment

Given the above, it is unsurprising that, in the Supreme Court, this case did not turn on the same issues as *Mabior*, but rather on the trial judge's rather surprising reasoning. The evidence the judge relied on did not corroborate the otherwise unreliable evidence given by the complainant. It was not evidence that a condom had not been worn on this other occasion, years earlier, but that it had broken.⁷⁴ It was of dubious evidentiary quality, both for its cryptic nature, and for language reasons (the conversation it reported was in French, though the doctor was Anglophone).⁷⁵ The judge's "inferences" that D.C. had lied, on that earlier occasion to her doctor, and this to conceal that she had been having unprotected sex were, at best, "speculative".⁷⁶ To convict D.C. on the basis of speculative inference breached the criminal burden of proof, which would have required specific proof beyond reasonable

⁶⁹ ibid., [4].

⁷⁰ *ibid.*, [8].

⁷¹ *ibid.*, [14]. The doctor did not remember her conversation with D.C.; her note read: "Sex c new partner – condom broke – consl to disclo".

ibid., [15] (references to the original judgment's paragraph numbers omitted).

⁷³ *ibid.*, [5].

⁷⁴ *ibid.*, [23].

⁷⁵ *ibid.*, [24].

⁷⁶ *ibid.*, [25]-[26].

doubt that she had failed to use a condom; and reversed the burden of proof, effectively requiring her to prove that she had used a condom, and not *vice versa*, requiring the Crown to prove she had not. D.C.'s conviction could not stand, and the appeal was dismissed.⁷⁷

H. Conclusion

The Canadian approach to criminalisation of exposure to HIV through sex is somewhat unusual among Commonwealth jurisdictions, in charging it as a sexual assault. The refined *Cuerrier* test put forward by the Supreme Court in *Mabior*, and referred to in *D.C.* renders the test somewhat tighter, and gives clarity to sufferers of HIV in Canada: where they are being treated with anti-retrovirals, and practise safe sex, and are therefore highly unlikely to transmit HIV, failing to tell sexual partners in advance of their HIV-positive status does not carry criminal liability.

The burden of proving guilt sits squarely with the prosecution - as confirmed, unsurprisingly, in D.C. This is especially important when dealing with a disease like HIV, which carries considerable stigma, and can engender such negative coverage in the public media.

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⁷⁷ *ibid.*, [30]-[31].

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